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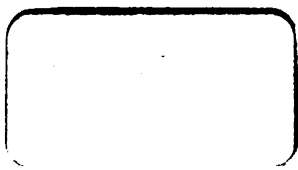
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Alabama,

DURING THE

NOVEMBER TERM, 1892

AND

NOVEMBER TERM, 1893.

BY

PHARES COLEMAN,

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CASES

IN THE

SUPREME COURT OF ALABAMA.

NOVEMBER TERM, 1892-93.

Tennessee River Transportation Co. v. Kavanaugh Bros.

Action to Recover the Value of a Barge.

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1. *Agents of a corporation; appointment.*—No formalities are essential to the appointment of an agent of a corporation unless expressly provided by its charter. They may be appointed in the same manner as the agents of individuals; and if a person is allowed to act as agent for a corporation, with the knowledge and acquiescence of a superior agent, or of one in authority who has power to appoint him, the corporation will be bound by such acquiescence, and can not repudiate the agency.

2. *Power of general agent under appointment by resolution of board of directors.*—An agent of a corporation, who, by a resolution of the board of directors of said company, is “authorized to take full charge of the company’s business, and to enter into such negotiations and contracts as he thinks best for the company’s interest,” has power to do any act within the scope of the business operations of the corporation, and in the discharge of such duties has authority to appoint an agent with power to make contracts to bind the company.

3. *Same; power of local agent appointed by general agent.*—Where a general agent of a corporation, with plenary powers conferred by resolution of its board of directors, introduces to third persons his appointee as the local agent of the corporation, with the assurance that any transaction had with the said local agent would be entirely satisfactory to and approved by the corporation, the corporation can not be relieved of its liability on a contract made by such local agent with the parties to whom he was introduced, by showing that the contract was, in fact, in excess of his powers.

4. *Evidence of agency.*—In an action against a corporation founded upon a contract alleged to have been made with the defendant’s agent, it is competent to prove, as tending to show the existence of

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the agency, that the alleged agent had made contracts with other persons as such agent, which were ratified by the defendant corporation.

5. *When an appellate court reviews an action of the trial court upon the admissibility of evidence.*—To justify a review by the appellate court of a ruling by the trial court upon the admissibility of evidence, the record must show affirmatively that the trial court made a ruling, which was excepted to at the time, or that counsel called attention to the question and requested a ruling upon it, which the trial court failed or refused to make, and that counsel making the request then and there reserved an exception to the court's failure or refusal to make such ruling.

6. *Sale of property; evidence of acts of ownership.*—In an action to recover the price of property alleged to have been sold to the defendant, evidence of any acts of ownership or control over the said property by the plaintiffs, subsequent to the sale counted upon, is admissible as tending to disprove the alleged sale.

7. *Rulings upon the evidence; error without injury.*—Where competent evidence, which has been erroneously excluded, is afterwards introduced on renewed inquiry, the error of its former exclusion is cured, and becomes error without injury.

8. *Agent of corporation at a particular place; irrelevant testimony.*—In an action against a corporation, founded upon a contract made with the defendant's agent, the question at issue being whether the person with whom the plaintiffs dealt was, in fact, the defendant's agent at a certain place, evidence that he transacted business for the corporation at another place sheds no light upon the inquiry, and is irrelevant.

9. *Admissions of agent against his principal; admissibility as a predicate for impeachment.*—Although in an action against a corporation, founded upon a contract alleged to have been made with the defendant's agent, an admission made by such agent is not competent evidence against his principal, unless that admission was made in company with, and at the time of the act of agency which it was intended to explain; still the question which calls for such evidence may be admissible for the purpose of laying a predicate for the introduction of impeaching testimony.

10. *Exercise by agent of powers not expressly conferred; when binding.* When, in the discharge of the duties imposed upon him, it becomes necessary for the agent of a corporation to take immediate action, and a consultation with the governing board would be impracticable, such agent may, in the interest of conservation, exercise powers not expressly conferred upon him; and such action is binding upon the corporation.

APPEAL from the City Court of Decatur.

Tried before the HON. W. H. SIMPSON.

This was an action brought by Kavanaugh Brothers to recover of the Tennessee River Transportation

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Company \$675, the value of a barge alleged to have been rented by the defendant under a contract, that if it failed to return the barge in as good condition as it was when received by the transportation company, it was to pay plaintiffs \$675.

The facts of the case are sufficiently stated in the opinion. On the examination of one Lewis, as a witness for the plaintiffs, he testified that he had several business transactions with C. H. Hobbs, as agent for the Tennessee River Transportation Company, and that the company had ratified the said transactions. The plaintiffs introduced in evidence an agreement made between the Tennessee River Transportation Company by C. H. Hobbs, as agent, with the American Oak Extract Company, of which the witness, Lewis, was agent. The defendant objected to the introduction of this paper, because it was irrelevant and immaterial. The court overruled said objection, and the defendant duly excepted.

Upon the examination of said C. H. Hobbs, and after he had testified that when away from Decatur he was at work on the river between Guntersville and Decatur, he was asked: "What were you doing during the time you were up the river?" Plaintiffs objected to this question, the court sustained the objection, and defendant duly excepted. The witness was then asked by defendant this question: "State whether or not you transacted any business for the transportation company away from Decatur except clerical work done on the boat?" The plaintiffs objected to this question, and their objection being sustained, the defendant duly excepted. On the cross-examination of the witness Hobbs, and after denying that he had an agreement with the plaintiffs to buy the barge in question, the plaintiffs asked the said witness the following question: "State if on or about the 25th of March, 1889, at the foot of Bank Street near the river, you did not have a conversation with Kavanaugh Brothers, in which you said the Tennessee River Transportation Company ought to pay Kavanaugh Brothers for the barge, and that you were going to Chattanooga soon to see that they did pay them for it; and at the same time did you not get from Kavanaugh Brothers a check that they had given to the transportation company, in payment of the bill for towing, saying that you

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wanted to use the check to show them that you had turned it in all right, and that you would take it up there and give them hell on that check business; and did you not threaten to sue them?" Defendant objected to this question because it was irrelevant and immaterial; and on the ground that it was a narrative of a past transaction, and called for declarations of an agent after the agency had ceased. Plaintiffs' counsel stated to the court that their object in asking this question was for the purpose of impeaching the witness. The court overruled the objection, and the defendant duly excepted. Upon the further cross-examination of said witness he was asked the following question: "Did you not ask Kavanaugh Brothers to submit you a statement as to what they would take from the Tennessee River Transportation Company in settlement of the barge matter, about April 14th, soon after the commencement of this suit; and did you not make of Louis T. Kavanaugh a verbal request for a statement in writing, saying that you thought you could get a settlement for this barge from Tennessee River Transportation Company?" The defendant objected to this question upon the same grounds interposed to the question just above. The counsel for plaintiffs "stated that he did not ask this question to call forth independent evidence, but solely for the purpose of impeaching the witness." The court overruled the objection, and the defendant excepted.

Upon the cross-examination of one T. V. Meyer, who testified that he was secretary and treasurer of the defendant, he was asked this question by the defendant: "State whether or not you, as secretary of this company, ever signed a certificate and filed it in the office of Secretary of State, at Montgomery, designating a known place of business and an authorized agent thereat?" Plaintiffs objected to this question, objection was sustained, and defendant duly excepted. On the cross-examination of one L. M. Meyer, a witness for the defendant, he stated: "I know Hobbs did not have authority to buy a barge, because the board of directors never empowered him to do so." The plaintiffs objected to this statement and moved to exclude it, which motion the court sustained, and the defendant duly excepted. In rebuttal, the plaintiffs introduced L. T. Kavanaugh, one of the plaintiffs, as a witness, and asked him this

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question: "State if on or about the 25th of March, 1889, at the foot of Bank Street in Decatur near the Tennessee river, you had a conversation with C. H. Hobbs about the purchase of the barge in this suit?" Defendant objected to this question on the ground that it was irrelevant and immaterial; and that it evoked a declaration of an alleged agent after the agency had ceased. Plaintiffs stated that he asked this question solely to impeach Hobbs. The court overruled the question, and the defendant duly excepted.

Among the many charges given at the request of the plaintiffs was the following: (17.) "I charge you, gentlemen of the jury, that under the evidence the general manager of the defendant, to-wit, Farnum, had authority to appoint agents to make contracts to bind the company, and if you believe from all the evidence that he did appoint Hobbs the agent of the defendant at Decatur, or held him out to the plaintiffs as such agent, and that Hobbs made the contract with the plaintiffs as set forth in the complaint, and that defendant or its agents injured and ruined the barge procured by Hobbs from plaintiffs, and that the use of a barge was within the scope of defendant's business operations, your verdict must be for the plaintiffs."

The defendant separately excepted to the giving of each of the several charges requested by the plaintiffs, and also separately excepted to the court's refusal to give the several charges requested by it. The opinion renders it unnecessary to set these charges out at length. There was judgment for the plaintiffs, and the defendant appeals; and as signs as error the several rulings of the trial court on the evidence, and the giving and refusing the several charges asked.

HARRIS & EYSTER, for appellant.—(1.) The statement of Farnum introducing Hobbs to the plaintiffs was not made in and about any business of the defendant, nor while in the discharge of his duties as general manager. The declarations of Farnum were, therefore, not binding on defendant.—*Danner Lumber Co. v. Stonewall Ins. Co.*, 77 Ala. 184; *Ricketts v. Birmingham St. Railway Co.*, 85 Ala. 600; 5 So. Rep. 353. (2.) The purchase of the barge by Hobbs was in excess of his authority, and the

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plaintiffs in dealing with him were bound to know the extent of his authority.—*Johnson v. Ala. Gas, Fuel and Manfg Co.*, 90 Ala. 505, 8 So. Rep. 101; *Burks v. Hubbard*, 69 Ala. 379; *Ladd v. Shattock*, 90 Ala. 134, 7 So. Rep. 764; *Cummins v. Beaumont*, 68 Ala. 204; 3 Brick. Dig., 22, § 54 *et seq.* (3.) The question asked one of the plaintiffs as a witness as to a conversation with Hobbs was erroneous. It was a mere narrative of a transaction, and that after the said Hobbs had left the employment of the defendant.—*Tennessee River Trans. Co. v. Kavanaugh*, 93 Ala. 324, 9 So. Rep. 395.

E. W. GODBEY, *contra*.—(1.) An officer of a corporation has implied authority to appoint sub-agents, whenever necessary, or authorized by usage.—*Johnson v. Cunningham*, 1 Ala. 249; Story on Agency, § 14; 1 Amer. & Eng. Encyc. of Law, 369; Wood's Field on Corp., §§ 182, 183; *Ala. & Tenn. R. R. Co. v. Kidd*, 29 Ala. 221; *Tenn. River Trans. Co. v. Kavanaugh*, 93 Ala. 331, 9 So. Rep. 395. (2.) Hobbs acted and contracted for appellant in so many instances, diverse in their character and effect, with its knowledge and consent, that the presumption of his appointment could not be denied even if no express authority was shown.—Story on Agency, (9th Ed.) §§ 10, 443, note; Bishop on Contracts, §§ 1102, 1101, 1100; Wood's Field on Corp., § 101. (3.) The emergency calling for a barge at the particular time was so grave and urgent as to "justify even a deviation from the ordinary limitations and import" of the authority.—Story on Agency, (9th Ed.), § 85.

STONE, C. J.—This is the second appeal in this case—93 Ala. 324, 9 So. Rep. 395. Most of the facts are stated in the report of the former decision. The testimony tended to prove the following facts, and, to this extent, there was little or no conflict. The defendant company was a foreign corporation, owning steamboats, and plying them between Decatur, Alabama, and points on the river above. It transported passengers and freight for hire, and, in connection with its freight business, it was in the habit of employing barges. It owned some barges. The barge which gave rise to the present suit was the property of Kavanaugh Brothers, and it was lying in the river at Decatur. Hobbs made a contract with Kavanaugh

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Brothers for the hire of the barge, and agreed to pay for its use a fixed compensation for every day he might retain it, and to return it in good repair. Failing to so return it, he agreed to pay for it as upon a purchase. The barge was taken in tow by one of the steamboats of the defendant corporation, was carried up the river, and was not returned to Decatur until a month afterwards. When returned it was very materially damaged, if not ruined, and Kavanaugh Brothers refused to accept it. They then brought the present suit to recover its alleged value. To this extent, as we have said, there was a substantial agreement in the testimony.

It was contended for plaintiffs, and their testimony tended to prove the contention, that they did not contract with Hobbs in his individual capacity, or on his credit. That Hobbs was the agent of the Tennessee River Transportation Company, and made the contract in its name and for its use. Their testimony tended to show that Hobbs, as such agent, had authority to make such contract for, and in the name of the transportation company. It went further, and tended to show that one Farnum, at and before the hiring of the barge by Hobbs, was the general manager of the transportation company, having large powers and control, and that he had introduced Hobbs to Kavanaugh Brothers and others as the transportation company's agent at Decatur, having power to contract in the name of the corporation. There was also testimony for plaintiffs tending to show that Hobbs had made contracts, one or more, in the name of the transportation company, which that company had ratified and complied with; purchasing property and the company paying for it.

The testimony for defendant was in conflict with that last stated. It denied the agency, denied that the contract was made in the name, or for the use, of the transportation company, but claimed that it was the individual contract of Hobbs himself. It gave testimony tending to rebut, explain, and parry the alleged acts of ratification.

We think we are in safe bounds when we affirm that Mr. Farnum, when he was the managing agent of the corporation, was clothed with very large powers; and there is nothing in the transcript before us to controvert or impair the force of that conclusion. We take a fur-

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ther step. It is shown without conflict that the transportation company employed barges in its business. They were used as lighters when the river was low. The tendency of the testimony is strong, that in some lines of their business—particularly in transporting timber—barges would be and were a convenience, if not a necessity. And there is testimony tending to show that in certain emergencies, such as a sudden rise of the waters in the rivers, it might become necessary to bring them into immediate service. Are not all these contingencies within the reasonable purview of the business the transportation company was engaged in? No unbending rule can be declared which defines and fixes the extent of incidental powers a corporation may exercise, nor the agencies and means through which it can and may exercise its functions. In the nature of things much must depend on the line of business the corporation is engaged in. Those whose powers and functions may be characterized as ambulatory have need of much more flexible rules than those whose entire business is transacted at a fixed, defined place.

In our former opinion we stated the main issue in this case to be one of fact. We said: "Whether Hobbs was the agent of the company; whether the barge was used in its business; whether it was leased by him for the company, or for his own private purposes, were questions of fact for the jury, and not of law for the court.

* * * Whether the use of a barge fell within the scope of the business operations and its mode of conducting them, was a question of fact for the jury, and not of law for the court. If the jury find that such was its custom, and further find that Hobbs was the company's agent, and as such made the alleged contract with Kavanaugh Brothers, and that the transportation company took charge of the barge, and used and destroyed it in its own business, then the transportation company is liable."

Plaintiffs rested their right of recovery in this case on the following grounds, which they undertook to establish by proof, and which they claim they did establish, namely: That the transportation company, being a foreign corporation incorporated in Tennessee, and its business calls and duties extending many miles up and down the river in Tennessee and Alabama, it must needs do much of its business away from the home office,

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and through its agents ; that it constituted A. M. Farnum its general manager with very large powers ; that he, Farnum, appointed Hobbs to be agent at Decatur, and clothed him with large powers, or, at all events, held him out to the public as being so clothed, and that Hobbs, contracting in the name of the corporation and professedly for its use, made the contract with plaintiffs, which is declared on in the present suit.

Plaintiffs introduced in evidence a resolution or motion adopted by the transportation company's board of directors, by which it was declared, "that A. M. Farnum is hereby authorized to take full charge of the company's business, and enter into such negotiations and contracts as he thinks best for the company's interest." This resolution was adopted in April, 1888, and under it Farnum continued in the company's employment until after the making of the alleged contract between Hobbs and Kavanaugh Brothers. Each of the Kavanaugh brothers testified that Farnum introduced Hobbs to them, "as agent of the Tennessee River Transportation Company at Decatur, and said he was going to make his headquarters at Decatur, and attend to their business ; and that any transaction we [Kavanaugh Brothers] might have with Hobbs would be entirely satisfactory and approved by the company. That he was the authorized agent, and we could deal with him as such." Another witness, engaged in business at Decatur, testified that Farnum introduced Hobbs to him, with substantially the same declaration as to his agency and powers as that testified to by the Kavanaugh brothers. The Kavanaugh brothers testified to the making of the contract with Hobbs as agent of the transportation company ; but Hobbs denied this, denied his agency, and disclaimed all authority to make a contract binding the company. There was other testimony in conflict with that of the Kavanaugh brothers, on the question of Hobbs' agency for the company.

Formerly corporations were very much hampered by rules and forms in making lawful and binding contracts. The wants of commerce have caused liberal relaxations in that regard. We spoke of this in our former opinion—93 Ala. 324. In 1 Morawetz on Corporations, §504, it is said : "The agents of a corporation may be appointed in the same manner as the agents of an individual ; no for-

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malities are required, nor is the use of the corporate seal necessary, unless the contrary be expressly provided by the company's charter. * * * If a person is allowed to act as agent for a corporation with the knowledge and acquiescence of the superior agent or authority, who would have authority to appoint him, the corporation will be bound by such acquiescence, and can not repudiate the agency." In 1 Amer. & Eng. Encyc. of Law, 338-9, the principle is thus expressed: "It is now generally held that a corporation may appoint agents by a written vote of its directors, or by implication, unless the charter makes a different appointment obligatory." And in 2 Morawetz on Corporations, § 585, is this language: "A principal, who employs an agent in a particular transaction or course of business, thereby impliedly invites persons dealing with the agent in that particular transaction or course of business to rely upon the agent's apparent powers, so far as this is essential to render safe dealing with the agent possible; and the principal will be liable to the person so dealing with the agent in good faith, within the scope of his apparent powers, although the agent may have transgressed the authority which the principal intended he should exercise."

We do not hesitate to declare, that, under the resolution adopted by the board of directors, Farnum was clothed with power to appoint Hobbs agent of the corporation, and to invest him with large powers. Neither can it be affirmed, as matter of law, that the alleged power, which the testimony of plaintiffs tends to show was conferred on Hobbs, was in excess of the authority the board of directors had vested in Farnum. Nor will we say that the contract, which plaintiffs testify Hobbs made with them, was outside of the powers which Farnum could himself exercise, or authorize Hobbs to exercise. So, the real points of contention in this case were, first, whether Farnum appointed Hobbs agent of the corporation, or informed plaintiffs he had so appointed him; and, second, whether in making the contract for the use of the barge, he contracted in the name of the transportation company, or in his own individual name. It may be added, that if Farnum, in introducing Hobbs to Kavanaugh Brothers, employed the language they testified he did employ, this authorized them to

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trust and trade with him as such agent; and the corporation can not relieve itself of liability, even by proving that in fact his powers did not extend so far. Apparent power, in such conditions, if authorized or sanctioned by the corporation, is the equivalent of actual authority.

We hold that all the testimony introduced tending to prove Hobbs' agency for the transportation company, to which an exception was reserved, was free from objection. Agency may be proved in many ways. Acts ratified or acquiesced in by the principal, or holding one out as agent, are among the methods and instrumentalities by which the relation is proved; and it is frequently implied from circumstances and the conduct of the parties towards each other. This lets in proof of acts and conduct of the parties in relation to each other, which have no direct reference to the issue on trial, if they tend to prove that the relation exists, or was acted on as existing.—2 Greenl. Ev., §§ 60, 62, 65, 67; 1 Amer. & Eng. Encyc. of Law, 338-9, 340; *S. & N. R. Co. v. Henlein*, 52 Ala. 606; 3 Brick. Dig., 20, § 10; *M. & M. Railway Co. v. Jay*, 61 Ala. 247; *Clark v. Taylor*, 68 Ala. 453. But a single act of ratification is not necessarily sufficient proof of the agency.

Proof that the witness Hobbs had previously made a statement different from what he testified to on this trial was not competent, save as a means of impeaching him. And when offered for that purpose, it was necessary to interrogate him as to such previous statement, fixing time and place, or otherwise directing his attention to the conversation by identifying circumstances.—3 Brick. Dig. 828. The rule was strictly conformed to in this case.

The testimony of one of the Kavanaughs that Farnum had made an admission, implying the liability and duty of the transportation company to pay for the barge, being at most only an admission of a past transaction, was not legal evidence. An objection had been filed to the interrogatory which called it out, but the transcript fails to show that the city court was required to rule upon it. To justify the action of this court upon the admissibility of evidence in the trial court, the record must show affirmatively that that court made a ruling which was excepted to at the time, or that counsel called attention to the question and requested a ruling upon it, which

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the trial court failed or refused to make, and that counsel making the request then and there reserved an exception to the court's failure or refusal to make the ruling. This question is not before us.

The right of plaintiffs to recover of the transportation company the alleged stipulated price and value of the barge, was rested on the following postulated facts, which they attempted to prove: That Hobbs was the authorized agent of the transportation company; that as such agent, in its name and for its use, he hired the barge at an agreed rent per day, with a further agreement to return it in good condition, or pay an agreed price for it as upon a purchase; that when the barge was returned it was in a ruined condition, and plaintiffs refused to receive it, and brought this action for its alleged agreed value, as upon a sale and delivery. Each of the plaintiffs testified that these were the terms on which they let the barge to the transportation company. Of course it was essential to the maintenance of their suit in this form—that is, for the price and value of the barge sold and delivered—that they should not have asserted any ownership or control of the barge after its return. If they had sold it, it was no longer their property; and any subsequent dominion or control over it by them, would have tended to disprove the alleged sale. Kavanaugh had testified in his direct examination that when the barge was returned to Decatur in its damaged condition, he refused to receive it, or to have anything to do with it. On cross-examination he was asked, "Did you not employ one Mr. Mayhan and some others to take it over the shoals for you, and take it to Memphis?" This question was objected to by the plaintiffs, the objection sustained, and the defendant excepted. In this ruling the city court clearly erred.

This ruling of the court, if it had remained unreversed, would require us to reverse this case, even if there be no other error. But the question was not left in that condition. Soon afterwards, as the bill of exceptions informs us, defendant's counsel renewed the inquiry, and the witness then answered it very fully, without further interference from either counsel or the court. This rendered the ruling harmless.

The issue in this case raised the inquiry whether Hobbs was the duly appointed agent of the transporta-

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tion company at Decatur, with authority to represent the company at that place, or had been so held out by one having authority to bind the company. Whether he had transacted any business for the corporation at any other place could shed no possible light on that inquiry. The city court did not err in disallowing that question to the witness Hobbs.

Even if Hobbs was proven to have been agent of the corporation when the alleged contract with Kavanaugh Brothers was entered into, this would not authorize an admission made by him to be given in evidence against his principal, unless that admission was made in company with, and at the time of the act of agency it was intended to explain. But the question was clearly admissible for the purpose of laying a predicate for the introduction of impeaching testimony. There was no error in this ruling.

All the rulings on the introduction of testimony are free from error.

A by-law of defendant corporation was put in evidence, in the following language: "The directors shall appoint a general manager, whose duty it shall be to look after the general interest of the company, and all business transactions pertaining to the general management of the business, under the direction of the board of directors." It was proved and not denied that from the fall of 1888, and until after the barge was returned to Decatur in a damaged condition, Farnum was the general manager of the defendant corporation. Each of the plaintiffs, giving their testimony separately, testified that Farnum, while so acting as general manager, and before the agreement affecting the barge was entered into, personally introduced Hobbs to them, informing them that the latter was "agent of the Tennessee River Transportation Company at Decatur, and said he was going to make his headquarters at Decatur, and attend to their business; that any transaction we might have with Hobbs would be entirely satisfactory, and approved by the company; that he was the authorized agent, and that we could deal with him as such." Another witness, a business man at Decatur, testified that Farnum introduced Hobbs to him as agent of the company at Decatur, using almost the identical language testified to by the Kavanaugh brothers. But there was testimony

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in conflict with this, some of which denied that Hobbs was agent, while other witnesses only disputed the extent of his authority. Of course, so far as material, this presented a question for the jury. It was proved and not denied that defendant employed barges in connection with its boats, in transporting freight on the Tennessee river; and it owned several barges.

We do not understand the contract, on which the present suit is sought to be maintained, as strictly a contract of sale and purchase. It was a hiring of the barge at so much per day, to be returned in good order. True, if the barge was not so returned, it was, if the testimony of plaintiffs be believed, to be paid for at an agreed price. But this was nothing more than a previous agreement of the amount of damages to be paid, in the event the contract to return was broken. This presents a different question from that of an absolute bargain and purchase, and also from what is known as a conditional sale. Pressing, present need might justify the hiring, while a promise to return in good condition, or pay an agreed forfeit, might be the most favorable terms on which the use of the barge could be obtained. Peril and the necessity for immediate action may, in some conditions, supply the place of express authority.

The undisputed testimony in this case is that the defendant corporation made free use of barges in the conduct of its regular business, and we can conceive of many emergencies in which the want of them might be so pressing, as not to admit of delay. We think we are in safe bounds when we declare that in such emergency any agent, not in communication with the constituted governing board, may, in the interest of conservation, exercise powers not expressly conferred. This power must be prudently exercised, and must not be carried beyond the real, or apparent necessity.—2 Morawetz Corp., §§ 585-588.

We have indulged in the foregoing remarks, as introductory to what we have to say of charge 17, given at the instance of plaintiffs, and excepted to by defendant. We hold, that under the by-law copied above, Farnum, the general manager, had authority to appoint an agent "to make contracts to bind the company;" and if he did appoint Hobbs such agent, and so informed plaintiffs; or, if he represented to plaintiffs that he had ap-

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pointed him with the powers set forth in their testimony ; and if Hobbs made the contract as set forth in the complaint, and the defendant, or its agents, injured and ruined the barge ; and if the use of a barge was within the scope of defendant's business operations, then plaintiffs were entitled to a verdict. In announcing this principle, we take into the account the nature of the business the defendant corporation was engaged in, covering, as that business did, a large extent of country and necessarily calling for action in emergencies, when a consultation with the governing board would be impracticable. Such intendments might not be indulged, if the corporation had a defined, fixed, stationary place in which its business operations were performed.

Many charges were given at the instance of plaintiffs, and many refused which were requested by defendant. These several charges were asked in writing, and the rulings were severally excepted to. We consider it unnecessary to comment separately on these many rulings. They are all covered and justified by our decision on the former appeal, 93 Ala. 324, 9 So. Rep. 395 ; and by what is said above.

The judgment of the city court is affirmed.

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123	637
101	15
127	509
127	613
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Bill in Equity to enforce a Mechanic's and Materialman's Lien, and to compel the Specific Performance of a Contract.

1. *Multifariousness.*—A bill in equity is not rendered multifarious by the addition of a prayer for alternative relief, when the averments of such bill are not duplex, but are appropriate and sufficient to warrant relief under either of the special prayers. Multifariousness can not be predicated solely upon the variant prayers with which a bill may conclude.

2. *Appointment of a receiver upon a bill filed to dissolve a corporation.*—When a bill filed by stockholders to dissolve a corporation, as provided by statute (Code, § 1683), contains averments which show a necessity for the appointment of a receiver for the corporation pending the proceedings for dissolution, a chancery court may appoint such receiver.

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3. *Powers of receiver appointed pending proceedings for the dissolution of a corporation.*—When a bill which seeks the dissolution of a corporation contains averments showing special grounds for the appointment of a receiver pending such proceedings, the receiver to be appointed by the court is authorized, not only to execute and perform the existing contracts of the corporation, but also to enter into and carry out new contracts in behalf of the company.

4. *Appointment of a receiver; can not be questioned in collateral proceedings.*—On a bill filed by the receiver of a corporation, who was acting under an appointment made after the dissolution of the company (Code, §§ 1683-86), the validity of his former appointment as receiver, pending the dissolution proceedings, can not be assailed; said attack being made in a collateral proceeding.

5. *Power of receiver of dissolved corporation to carry out existing contract.*—While a receiver, appointed under section 1686 of the Code has no authority, as a general rule, to carry out and perform existing contracts of the dissolved corporation, and can only be empowered to perform such conditions as are prescribed by said section, he may, nevertheless, complete the execution of an existing contract, when such execution is necessary to the discharge of the duties and powers expressly imposed and conferred by such statute.

6. *"As soon as possible" in a contract means within a reasonable time.* The stipulation in a contract for the completion of work "as soon as possible," requires the work to be completed within a reasonable time, or within such time as is reasonably necessary, under the circumstances, to do what the contract required to be done.

7. *Waiver of right to rescind a contract.*—The right to rescind a contract for unreasonable delay in the completion of the work agreed to be done is waived and lost by the acceptance of the work done in its incomplete condition, and the devoting of the same to the objects for which it was built.

8. *Specific performance of a contract; when not enforceable.*—When, on a bill filed by the receiver of a dissolved corporation, seeking the specific performance of a contract made between such corporation and another company, it is shown that in the contract the corporation, of which the complainant is the receiver, agreed to construct an electric light plant for the defendant corporation, and to pay off debts due from the defendant corporation, some of which were secured by a mortgage, and that the defendant agreed to issue first mortgage bonds to the construction company, to secure the debt arising from the performance of the work stipulated, with leave to take the bonds in absolute payment after a certain time, a specific performance of such a contract can not be decreed, when the bill contains no averment that the debts due from the defendant to third parties, which were agreed to be paid by the construction company, had been paid, nor an averment of an offer, or even a readiness or willingness to pay such debts; the failure of the construction company to perform its part of the contract by paying the debts, making a specific perform-

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ance of the contract by the defendant, by the delivery of first mortgage bonds, impossible.

9. *Partial performance of work, and acceptance thereof; sufficient for establishment of mechanic's and material-man's lien.*—Although a contract, as originally made, was not severable, and there could have been no recovery for work done under it, except upon full performance of the contract, still, if there has been a part performance of the contract, and the owner has accepted it in its approximately completed condition, and is using it for the objects for which it was built, the law implies a promise on his part to pay what the work done is reasonably worth, and the contractor is entitled to enforce this debt by a mechanic's and material-man's lien.

10. *When right to a mechanic's and material-man's lien not affected by act of February 12, 1891.*—When a contract is entered into, and the work and materials for which a lien is sought to be enforced were done and supplied, and a bill to enforce such lien is filed, prior to the passage of the act of February 12, 1891, (Acts 1890-91, p. 578), providing for mechanic's and material-man's lien, the right to the enforcement of such lien is not affected by said act.

11. *When authority of a corporation is to be presumed.*—When a bill is filed by the receiver of a dissolved corporation for the enforcement of a mechanic's and material-man's lien, and the specific performance of a contract for certain work done, it is to be presumed, in the absence of any averment to the contrary, that the construction company was authorized by its charter to enter into and perform the contract involved in said suit.

APPEAL from the Chancery Court of Lauderdale.

Heard before the HON. THOS. COBBS.

The bill in this case was filed by S. M. Hanby, as receiver of the Southern District Telegraph & Electric Company, against the Florence Gas, Electric Light & Power Company, and prayed to have enforced upon the property of the defendant a mechanic's and material-man's lien in favor of the plaintiff, and also for the specific performance of a contract entered into by the two corporations. The material facts of the case are sufficiently stated in the opinion.

The respondent demurred to the bill of complaint, and assigned the following grounds: 1st. The bill shows that S. M. Hanby was appointed receiver of the Southern District Telegraph & Electric Company upon the filing of a bill by the stockholders of said corporation for its dissolution under sections 1683 *et seq.* of the Code of Alabama; and that upon his appointment, the said receiver was authorized and empowered to collect, by suit or otherwise, all of the debts of said corporation,

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and to complete all its outstanding contracts, which said corporation had made for the erection and construction of electric plants; and the bill shows that said appointment was unauthorized, illegal, null and void, and that no subsequent action of the court could render the appointment of said Hanby valid, or vest in him the power and authority claimed. 2d. That as the appointment of said Hanby as receiver was made immediately upon the filing of the bill praying for dissolution, and before a decree of dissolution of the corporation was rendered, the said appointment was illegal, unauthorized by the statute under which the petition to dissolve the corporation was filed, and that, therefore, said Hanby was not legally receiver of said corporation, and was not authorized to institute the present suit. 3d. Said bill shows that, on the filing of the bill for dissolution of the corporation, the said Hanby was appointed the receiver of said corporation with power to collect all the debts and to complete all outstanding contracts of said company that it may have made for the erection and construction of electric plants, &c., and that upon the decree rendered dissolving the corporation that said Hanby's receivership and his powers thereunder contained were continued. This was not authorized under the statute by virtue of which the original bill for dissolution was filed, and his appointment was, therefore, null and void, and the court could not by subsequent decree legalize its action. 4th. The contract between the Southern District Telegraph & Electric Co. and the respondent, was that the plant contracted to be erected should be completed as soon as possible, and the bill shows that said plant was not erected at the time said Hanby was appointed receiver—more than a year after said contract was made; and said bill fails to show that said plant could not have been completed sooner, or that the Southern Dist. Tel. & Elec. Co. was not guilty of unreasonable delay in completing the said contract. 5th. Under the said contract above mentioned the plant was to be completed as soon as possible, and the bill fails to show any reasonable cause why said plant was not erected or completed before the dissolution of the Southern Dist. Tel. & Elec. Co., or the appointment of said Hanby as its receiver. 6th. Said bill shows that the Southern District Telegraph & Electric Co. did not erect and complete said

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electric plant as they contracted to do with the respondents, as shown by the contract, and that, therefore, the defendant was released from all obligations arising under said contract by the inexcusable delay and negligence of said corporation to comply with its contract. 7th. The bill shows that the Southern District Telegraph & Electric Co. went into the hands of a receiver more than a year after it had entered into a contract with the defendant, and that at the date of the appointment of the receiver it had failed to comply with said contract, and the bill fails to show any satisfactory legal reason or excuse for its failure to comply with said contract, or that it could not, by ordinary diligence, have completed said contract before the expiration of one year and before the appointment of a receiver. 8th. The bill shows that Hanby was appointed receiver of the Southern District Telegraph & Electric Co. upon a bill being filed under sections 1683 *et seq.* of the Code of Alabama. Under the provisions of said statute the receiver could not be vested with power to complete the unexecuted contracts of the corporations, and the decree of the court vesting in him such power was null and void, and, therefore, the receiver had no authority to complete said contract made by the defendant. 9th. The said bill shows that at the time of the dissolution of the Southern District Telegraph & Electric Company it was involved, and that it went into the hands of a receiver on account of its inability to collect its debts and the stringency of the money market, and that it had no means to complete its contract with the defendant. 10th. The said bill does not show that the said Southern District Telegraph & Electric Company has ever offered or proposed by its officers or agents, or any one authorized to represent it, to complete its contract with the defendant, and that S. M. Hanby had no power, by virtue of his appointment as receiver, to complete said contract. 11th. The bill shows that the said Southern District Telegraph & Electric Co. in its contract with the defendant contracted to pay at once the money due by the defendant to the Westinghouse Electric Company for the purchase of its plant, and the debts then owed by the defendant, and the bill fails to show or allege that the said Southern District Telegraph & Electric Co., or its receiver, has paid said moneys as it contracted to do, and, therefore, the receiver

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is not in a position to ask for specific enforcement of the contract with the defendant. 12th. Under the contract with the defendant the Southern District Tel. & Elec. Co. was to pay the amount due the Westinghouse Electric Co., and the debts due by the defendant, which the bill shows were due at the time of the execution of said contract, but the bill fails to allege said payments were made by said Southern District Tel. & Elec. Co., or its receiver. 13th. The bill shows that the purpose of the Southern District Tel. & Elec. Co. agreeing to pay said moneys due by the defendant was to enable the defendant to pay and satisfy a mortgage due by it on its plant held by the Westinghouse Elec. Co. and the debts pressing at the time, so that it could execute a deed of trust on all of its property to secure bonds which were to be issued and delivered to said Southern District & Electric Co., as required in the contract, and that the lifting of the mortgage held by the Westinghouse Electric Co. on the plant of the defendant was a condition precedent to the issuance of said bonds and to the delivery of them to the Southern District Telegraph & Electric Co., and the bill fails to show that this condition precedent has been complied with. 14th. The bill presents inconsistent alternative claims for relief, in that it prays for the enforcement of a lien in favor of the complainant, and also for the specific performance of the contract set forth in an exhibit to the bill. 16th. Neither said bill nor the exhibits thereto allege or show when the sum claimed to be due by the defendant to the Southern District Tel. & Elec. Co. became due and payable. 17th. The bill fails to show that the plaintiff filed its claim or lien in the probate office of Lauderdale county, claiming a lien on the property of the defendant, within six months after the indebtedness accrued. 18th. The bill shows that both the Southern District Telegraph & Electric Co. and S. M. Hanby, as receiver of said company, filed in the office of the probate court of Lauderdale county, Alabama, statements in writing claiming liens on the property of the defendant. 19th. Neither said bill nor the exhibits thereto show when the indebtedness claimed against the defendant accrued. 20th. The averments of the bill and the exhibits thereto show that complainant has no lien either as a mechanic or a material-man as provided by law. 21st. The bill and exhibits show

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that the account claimed to be due to complainant was due more than six months before the filing in the office of the probate court of Lauderdale county the claims and accounts, preparatory for the enforcement of the lien. 22d. The complainant has a plain, adequate and complete remedy at law.

On the submission of the cause on the demurrers to the bill, the chancellor sustained the 16th and 17th grounds, and overruled all the other grounds of demurrer. The defendant now brings this appeal, and assigns as error the decree of the chancellor overruling the several grounds of demurrer.

EMMET O'NEAL, for appellant.—There was no excuse shown in the bill for the long delay on the part of the Southern District Telegraph & Electric Company in not completing the electric light plant for the defendant. In that contract time was made the essence of the contract by the defendant. The insolvency and the dissolution of the construction company was no sufficient excuse for the non-performance of the contract.—*Jones v. Anderson*, 82 Ala. 302, 2 So. Rep. 911; *Smith v. Brady*, 72 Am. Dec. 442; *Mizell v. Burnett*, 69 Am. Dec. 745. The construction company having violated its contract, the defendant was authorized to rescind the same.—*Hewlett v. Alexander*, 87 Ala. 193, 6 So. Rep. 49. The receiver, who is the complainant in this case, was not in a position to ask for the specific performance of the contract. The defendant was not required by the contract to issue bonds until the mortgage given by it to third parties had been satisfied by the receiver's company, and the other debts had been paid. The construction company failed to perform its part of the contract, and rendered the specific performance of the contract by the defendant corporation impossible, nor did the bill contain averments that the said debts had been paid, or any averment offering to pay said debts. A fundamental rule of equity pleading requires that every fact essential to the complainant's right to maintain a bill must be stated therein.—*Christian v. Amer. Freehold Land Mortg. Co.*, 89 Ala. 198, 7 So. Rep. 427. The bill does not show that it was within the authorized powers of the Southern District Telegraph & Electric Company to construct the electric plant, which it agreed to build for the defendant. If the contract was *ultra vires*, then no right of action can be maintained.—

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Chewacla Lime Works v. Dismukes, 87 Ala. 347, 6 So. Rep. 122; *Eufaula v. McNabb*, 67 Ala. 588; *City Council v. Montgomery & Wetumpka Road Co.*, 31 Ala. 76.

MOUNTJOY & TOMLINSON, *contra*.—(1.) The appointment of a receiver in a pending suit, where the court has jurisdiction of the parties and subject matter, can not be collaterally assailed.—*Comer v. Bray*, 83 Ala. 217, 3 So. Rep. 554; *High on Receivers*, § 225; *Wait on Insolvent Corporations*, § 245; *Keokuk Northern Line P. Co. v. Davidson*, 13 Mo. App. 561; *Attorney Gen'l v. Guardian Mut. Life Ins. Co.*, 77 N. Y. 272; *Richard v. Peoples* 81 Ill. 551. (2.) Without the aid of statute, the chancery court has the power to appoint a receiver pending litigation.—*Myer v. Johnston*, 53 Ala. 237. (3.) The unauthorized appointment of a receiver may be cured by subsequent legal appointment.—*In re Stonebridge*, 13 N. Y. 770. (4.) The term “as soon as possible,” in a contract, is considered by courts to mean within a reasonable time.—*Hinds v. Kellogg*, 13 N. Y. Sup. 922; *Hydraulic Co. v. McHaffie*, 29 Moak, Eng. R. 102; *Benjamin on Sales* (Bennet’s Ed.), § 687; *Arthur v. Wright*, 10 N. Y. Sup. 368. (5.) A chancery court has authority to empower a receiver to carry on the business where such course is necessary to protect and preserve the property.—*Wait on Insolv. Corp.*, § 214; *Pond v. Cook*, 45 Conn. 30; *Blake Crusher Co. v. New Haven*, 46 Conn. 473; *Cooke v. Town of Orange*, 48 Conn. 409. (6.) If the part of a contract to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable.—3 Am. & Eng. Encyc. of Law, p. 917, and note; *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351; *Quigley v. DeHaas*, 82 Pa. St. 267, 273; *Scott v. Kittanning Coal Co.*, 89 Pa. St. 231; *Johnson v. Johnson*, 3 B. & P. 162; *Robinson v. Green*, 3 Met. (Mass.) 159; *Mayfield v. Wadsley*, 3 B. & C. 357; *Mayor v. Pyne*, 3 Bing. 285; *Perkins v. Hart*, 11 Wheat. (U. S.) 237, 251; *Withers v. Reynolds*, 2 B. & A. 882; *Sickles v. Patterson*, 14 Wend. (N. Y.) 257; *McNight v. Dunlop*, 4 Barb. (N. Y.) 36, 47; *Snook v. Fries*, 19 Barb. (N. Y.) 313; *Carleton v. Woods*, 8 Foster (N. H.) 290; *Robinson v. Snyder*, 25 Pa. St. 203; 3 Amer. & Eng. Encyc. of Law, p. 925; *Snow v.*

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Alley, 11 B. E. Rep. (Mass.) 764. (7.) An alternative prayer does not of itself render a bill multifarious.—*Lyons & Co. v. McCurdy*, 90 Ala. 497, 8 So. Rep. 52; *Coulton v. Ross*, 2 Paige, 396; s. c. 2 N. Y. Ch. Rep. 959; *Harden v. Boyd*, 113 U. S. 756; *Kilgore v. N. O. Gas Light Co.*, 2 Woods 144; *Mitford & Tyler Eq. Plead.*, 285; 1 *Daniels Chan. Pr.*, 385. (8.) The receiver of a corporation dissolved by the chancery court under the provisions of the Code, providing for the voluntary dissolution of corporations by the chancery court, has the same rights as the corporation, but suit must be brought by or against him.—*Comer v. Bray*, 83 Ala. 217, 3 So. Rep. 554; *Nelson et al. v. Hubbard*, and *Adams Cotton Mills v. Dimmick*, 96 Ala. 238, 11 So. Rep. 428. (9.) When a contract is payable in something other than money, and the payer fails to make payment in such article, then the price becomes payable in money at once on such default.—*Church v. Feterow*, 2 P. & W. (Pa.) 301. (10.) A statutory lien arises by virtue of the contract, and the furnishing of the materials or the construction of the building. It is implied by law, and no reservation or stipulation is necessary.—*Phillips on Mechanics Liens*, §§ 159, 118, 182, 202; *Hill v. Newman*, 38 Pa. St. 141; *Cooper v. Cleghorn*, 50 Wis. 113; *Hubbell v. Schejger*, 15 Abb. Pr. (N. S.) 300; *Powder Co. v. Byrnes*, 12 Abb. Pr. 469; 21 *Cen. L. J.* 306; *Hill v. Railroad Co.*, 11 Wis. 214; 72 *Mo.* 664; 74 *Mo.* 374; *Chase v. James*, 10 *Hun.* (N. Y.) 506; *Hogan v. Cushing*, 49 *Wis.* 169; *Helm v. Chapman*, 5 *Pac. Rep.* 352; *Davis v. Alford*, 94 U. S. 545; *Mining Co. v. Collins*, 104 U. S. 176. (11.) On failure of builder to complete building within the specified time, the proper rule seems to be that the builder should be allowed to sustain his suit on the contract, subject to defendant's equitable right to show any damages he may have sustained by the delay by way of set-off or as cause of action in a cross-suit. *Loyd on Law of Building & Buildings*, p. 58; *Lucas v. Godwin*, 3 *Bing.* (N. C.) 737; *Smith v. Gugerty*, 4 *Bard.* 614; *Lindsay v. Gordon*, 13 *Me.* 60; *Parker v. Thorold*, 16 *Beav.* 59.

McCLELLAN, J.—The appellee, Hanby, as receiver &c., is the complainant in the present bill, to which the appellant, the Florence Gas, Electric Light & Power Co., is respondent. The corporation of which complainant

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is now receiver entered into a contract on July 6, 1889, with the respondent corporation to construct and erect complete for the latter an electric light plant at Florence, and equip the same with specified machinery, appliances, &c., for lighting the town of Florence with electricity. The contract contains a stipulation for the erection of the plant "as soon as possible." The construction company also undertook in said contract to pay an outstanding indebtedness of the Florence company to the Westinghouse Electric Company, amounting to \$2,200, which was secured by a mortgage on an existing plant of the former, "thereby lifting" said mortgage, which existing plant, it is fairly inferable, was to be incorporated with and made use of in the construction of the new plant; and also to pay the current indebtedness of said company, amounting to \$2,000. For all this the construction company was to receive twenty-six thousand dollars (\$26,000), payable at certain specified rates of discount on face value in bonds of the Florence company, which were to be "secured by a mortgage or deed of trust on the entire plant and lot [on which a 'power house' was to be erected] of sufficient face value to net the above amount (\$26,000), said plant and lot to be free of all incumbrances." It was further stipulated that the bonds should not be issued to the construction company in excess of the work done or machinery furnished by it, the implication being that partial issues and deliveries of bonds were to be made during the progress of construction. The contract contains also the following provision: "Said bonds to be delivered to us to be used by us as collateral security for six months, unless sooner sold; but either you [the Florence company] or ourselves shall have the privilege of selling said bonds at par. If said bonds shall not be sold before the expiration of six months, then we shall have the option of extending the time for the sale of said bonds until they can be sold, or of taking them in payment of the debt of \$26,000. If taken in payment of the debt, you are to issue to us enough bonds bearing 7 per cent interest to net us at 90 cents on the dollar \$26,000, or you will furnish us enough bonds bearing 6 per cent interest to net us \$26,000 at 85 cents on the dollar." It thus appears that, contrary to the first provision of the contract in this connection noted above, the contract did not contemplate

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absolutely that bonds should be taken in payment of the \$26,000, but that in the first instance the construction company should take the bonds as collateral with power to sell and apply the *proceeds* to the debt within six months, and that after the lapse of that time the construction company was to have the option either to extend the time of sale indefinitely—until the bonds could be sold—or to take them in payment of the debt. The bill avers that on August 5, 1890, a majority of the stockholders of said Southern District Telegraph & Electric Company, representing more than three-fourths of the capital stock thereof, filed a bill in the chancery court for a dissolution of said corporation according to law, and the present complainant, upon special grounds set out and shown in said bill, was appointed upon the filing thereof receiver of all the corporate property and assets of said company, and empowered and authorized to collect by suit or otherwise all the debts due to said company, and to complete all the outstanding contracts which said company had made for the erection of plants, &c.; and that on the 20th January, 1891, upon a decree rendered in the cause dissolving said corporation, the complainant's receivership and his powers thereunder were continued, and he was further appointed receiver upon the dissolution of said corporation as provided by law, with all the powers and authority given him as such receiver by law.

The averments of the bill as to what has been done and offered to be done by the construction corporation and the complainant as receiver thereof in performance and discharge of the contract with the Florence company, and as to the latter's attitude in respect of the matter of performance, are contained in the third paragraph thereof, which is as follows: "That said Southern District Telegraph & Electric Co., immediately undertook and proceeded to perform said work and erect said plant, that it had substantially completed said work and erected said plant, when the same was turned over to and accepted by respondents, who are now operating the same in lighting the city of Florence. That after substantially completing the work, as aforesaid, owing to the stringency of the money market and its inability to collect its debts, said Southern District Telegraph & Electric Company went into the hands of a receiver. That your

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orator, the said receiver, at once notified said Florence Gas, Electric Light & Power Company that he would go on, as he was authorized and empowered by the chancery court, and complete said contract. That your orator sent necessary workmen to Florence to complete all of said work, and had material shipped there to complete the same, but defendant refused to allow said work to be proceeded with, claiming that they had a right to rescind said contract." The bill further avers the filing of verified statements of the claim and debt of the construction company against the Florence company for work and labor done and materials furnished by the former under the contract in the office of the judge of probate of Lauderdale county, with a view to fastening mechanic's and material-man's lien on certain described property of the latter company and upon the improvements thereon, &c. Copies of these statements are exhibited to the bill, and assignments of demurrer, numbered 16 and 17, which went to their sufficiency under the statute, were sustained. No appeal is taken by complainant, and this ruling of the chancellor is not presented for review, nor does this record present any question as to whether the statements can be amended in the particular of their adjudged insufficiency, and we are neither called upon nor authorized to decide whether they are so amendable or not.

What we have quoted from the bill is all shown by it as to the performance of the contract on the part or in behalf of the construction company, or as to the time within which what was done at all by said company, in work and labor or in supplying materials, &c., was performed. It does not appear from the bill whether the debts which the Florence company owed at the time of contract made, and which thereby the construction company undertook to pay, namely, \$2,200 to the Westinghouse Co., and \$2,000 to other creditors, have been paid or not by the construction company, or otherwise.

The leading prayer of the bill is for the enforcement of the debt claimed to be due the construction company, about \$24,000, as a mechanic's and material-man's lien against the Florence company and on certain property of that company. There is also an alternative prayer for specific performance of the contract through a decree compelling the defendant corporation to issue

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to complainant as receiver &c., the bonds stipulated for in the contract. All demurrers to the bill, except the two referred to above, were overruled, and from the decree in that behalf this appeal is prosecuted by the respondent company.

1. We may as well say here as elsewhere that there is no merit in the contention that the bill was rendered multifarious by the addition of the prayer for alternative relief. The averments of the bill are not duplex. All of them would have been proper, in respect, at least, to the rule against multifariousness, had there been only one, and either one, of the special prayers we have stated; and multifariousness can not be predicated solely upon the variant prayers with which a bill may conclude.—*Lyons v. McCurdy*, 90 Ala. 497, 8 So. Rep. 52.

2. The dissolution of the Southern District Telegraph & Electric corporation and the final appointment of complainant as receiver thereof must be referred to sections 1683 *et seq.* of the Code. The section named provides for the filing in the chancery court of a *petition* by a majority of the stockholders, owning three-fourths of the stock, setting forth the names and residences of all the stockholders, &c., as nearly as practicable all the property of the corporation, and that it is the wish of the petitioners to dissolve the corporation. If no other relief than dissolution is sought, and only this statutory petition is filed, the court is without jurisdiction to grant, by interlocutory or final decree or order, any relief beyond or other than that prescribed by the statute; that is, it could only decree dissolution, and *upon* the passing of that decree appoint a receiver under and with the powers prescribed in section 1686 of the Code. But it may be that there is necessity for other relief than this; it may be that pending the proceeding for dissolution it is necessary, on account of the misfeasance or malfeasance of the directors and officers of the corporation, for the power of the the court to be exercised to the preservation of corporate property and rights by such interlocutory orders or process as will meet the necessity and conserve the end in view. In such case, should the stockholders be forced to file a bill for the temporary relief to which they are entitled, and at the same time institute in the same court a separate proceeding

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for the final relief of dissolution to which the interlocutory relief is merely an incident? We think not. To the contrary, we can conceive of no reason why the statutory petition may not be incorporated with a bill alleging the facts authorizing dissolution and the facts which show a necessity for the intervention of the court pending the proceeding for dissolution, to the end that the property of the corporation may be saved *pendente lite* for administration by the receiver to be appointed on final decree under the statute. Good pleading indeed—the rule against multiplicity of suits—would seem to absolutely require that these purposes, the dissolution of the corporation and appointment of a receiver under the statute, and the preservation of the property *ad interim* for its final disposition by the receiver, should be sought and accomplished in one and the same bill. The present bill contains averments which show that the bill filed by the stockholders was of this character; that bill, it is alleged, contained averments of special grounds for the appointment of a receiver of the corporation pending the proceeding under the same bill for a dissolution thereof. Upon such a bill the chancery court had jurisdiction, aside from statutory provisions, of the matter of appointing a receiver pending final action on the prayer for dissolution and consequent appointment of a receiver under the statute.—*Meyer, Trustee &c. v. Johnston & Stewart, Trustees*, 53 Ala. 237. And if the appointment was merely irregular and erroneous—it could not have been void in this state of case—its validity can not be questioned by the present respondent in this purely collateral proceeding.—*Comer v. Bray*, 83 Ala. 217, 3 So. Rep. 554. The assignment of demurrer which sought to impeach the original appointment of complainant to be receiver of the Southern District Telegraph & Electric Company were properly overruled. As to the entire regularity of the second appointment—that made upon final decree of dissolution—the averments of the present bill leave room for doubt.

3. The first appointment, that made “on special grounds” upon the filing of the bill for *ad interim* relief and dissolution, was referable to the general jurisdiction of courts of chancery to appoint receivers *pendente lite*; and in the exercise of this jurisdiction it was clearly within the competency of the court not only to empower

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the receiver to execute and perform existing contracts of the corporation, but even to enter into and carry out new contracts in behalf of the company.—Beach on Receivers, §284; 20 Am. & Eng. Encyc. of Law, p. 154.

4. A somewhat more difficult question arises as to the power of a receiver appointed under section 1686 of the Code—the power of this receiver under his final appointment on decree of dissolution—to carry out and perform existing contracts of the corporation. By that section the powers which may be invested in a receiver are to take possession and control of all the property and assets of the corporation, to collect by suit or otherwise all the debts due thereto, sell its property and make conveyances thereof, and to proceed without suit to sell any or all of the debts and assets of the corporation at public sale for cash, or on such terms as in his judgment the interest of the parties may require. These statutory provisions mark the limits of the court's competency to confer powers on the receiver of a dissolved corporation. But these powers when conferred by the decree involve and carry with them such power as may be implied from the general object and spirit of the statute, or as are incidental to the authority expressly given.—Beach on Receivers, § 434; *Runyon v. Bank*, 3 Green Chancery (N. J.) 480; *Emblee v. Shideler*, 36 Ind. 423. In the case at bar the receiver asserts the power and authority to perform and discharge the obligations resting on the corporation by the terms of a contract of force at the time its corporate entity was destroyed by the decree of dissolution. That power is not expressly given in the statute, nor is the court thereby expressly authorized to confer it on the receiver. Can it be implied from the general object and spirit of the statute, or as an incident to the powers which are expressly conferred or allowed to be conferred on the receiver? We need not respond to this inquiry in the precise form in which it is put. The facts of the present case do not require it. These are, as has been indicated, that the construction company had entered into a contract to erect a plant for the Florence company for \$26,000, and had substantially, in the sense of nearly, completed the erection thereof when the dissolution was had, but no part of the agreed price therefor had been paid. Upon dissolution it was necessary to the collection of this claim against the Florence company

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that the contract to erect and construct the plant should be fully executed and the plant completed, or to show that an offer so to do had been made in good faith and declined. Very clearly in equity and good conscience, especially when reference is had to the fact that the Florence company had accepted the plant so far as erected and it was being made to subserve the purposes of its erection, here was a debt in some amount owing to the dissolved corporation. This debt the receiver was empowered to collect by suit or otherwise. The performance or offer to perform in full the contract which had already been nearly completed was a condition precedent to a demand for the payment of this debt in full. Without it the debt could not be collected. Without it the receiver could not execute the power which the law and the decree expressly gave him, and discharge the duty resting on him. The performance of the unexecuted part of the contract, or a readiness and offer to perform, was clearly within the object and spirit of the statute and incidental to the power which is thereby expressly vested in the receiver. While not deciding that a receiver under this statute has authority to perform all existing contracts of the corporation, we hold that the complainant was empowered to complete the execution of the contract with the Florence company, such execution being necessary to the discharge of the duties and powers which were expressly imposed and conferred on him, and that his offer so to do and the declination thereof must be accorded the same effect in this case as had there been no dissolution and the offer had been made by the construction corporation itself.—Wait on Insolvent Corporations, § 214; *Pond v. Cook*, 45 Conn. 130.

5. The stipulation in the contract for the completion of the work contracted for "as soon as possible" is to be construed to require the erection and construction of the plant complete within a reasonable time, or within such time as was reasonably necessary, under the circumstances, to do what the contract required to be done.—1 Am. & Eng. Encyc. of Law, p. 777, note 1, and authorities there cited.

As we have seen, the bill avers that the construction company, immediately on the making of the contract, undertook and proceeded to perform the work and to erect

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the plant contracted for, that it had substantially completed said work and erected said plant, when the same was turned over to and accepted by the Florence company, and that said company at the time of filing the bill was operating the same in lighting the city of Florence, thus subserving the purposes of its erection. The bill further shows, however, that the plant was not entirely completed according to the specifications of the contract, but that complainant was ready and willing and had offered to complete it. It can not be affirmed, on this state of averment, that the bill shows that there was any violation of the compact in respect of the time in which the work that was done was in fact performed; and even if there had been unreasonable delay on the part of the construction company in that regard the fault was condoned, and any right the Florence company might otherwise have had to rescind the contract was waived and lost by its acceptance of the work done, and of the plant in its then approximate completed condition, and devoting the same to the objects of its erection. This, we think, gave the construction company a claim for the value of work and labor done and materials supplied prior to and up to the time of the acceptance, and whatever damage the Florence company sustained from a subsequent unreasonable delay on the part of the construction company or this complainant to fully perform the then unexecuted parts of the contract is, at most, matter for recoupment. And this conclusion is aided, in this instance, by reference to that provision of the contract, which clearly contemplates that payments were to be made to the construction company from time to time as the work progressed.

6. It is to be conceded, that the bill contains no averment that the debts due from the Florence company to third parties, which were to be paid by the construction company, had been paid, and no averment of an offer, or even a readiness or willingness, to pay the same. It may be taken, therefore, as showing a violation of the contract in this respect by the construction company. What is the effect of this infraction upon the relief sought? It is, in our opinion, fatal to the prayer for specific performance. The bonds which the contract stipulates for, and which the prayer for specific performance would involve the issuance of, were to be secured by a mortgage

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or deed of trust on the property of the Florence company, which property was to be free from all incumbrances. The debt due the Westinghouse company was secured by a mortgage on this property or a part of it. Until this debt was paid and this mortgage "thereby lifted", the Florence company could not, even had it desired so to do, have issued the bonds stipulated for, because the property which was to be pledged to secure them was incumbered, and this incumbrance was the result of the fault and failure of the construction company to pay off the Westinghouse mortgage as it had agreed to do. The prayer for specific performance, therefore, in effect invokes the jurisdiction of chancery to compel the defendant to do an act which the failure of the construction company to perform its contract has left impossible of performance. There can be no equity in such a demand.

7. This consideration, however, has no application in respect of the prayer of the bill looking to the enforcement of complainant's claim for work done and materials furnished, &c., as a lien on the property of the defendant corporation. The part performance, averred in the bill, and defendant's acceptance thereof suffice to entitle complainant to recover for the work and labor done and materials furnished, even if it be conceded that the contract was not originally severable, and that but for such acceptance complainant could have recovered nothing except upon full performance of the entire contract, or a part performance with a readiness and offer to perform in full, seasonably made and declined by the defendant. This upon the principle that, "if one party, without the fault of the other, fails to perform his side of the contract in such manner as to enable him to sue upon it, still if the other party has derived a benefit from the part performance, it would be unjust to allow him to retain that without paying anything. The law, therefore, generally implies a promise to pay what it is reasonably worth."—3 Amer. & Eng. Encyc. of Law, pp. 920-922; *Hayward v. Leonard*, 7 Pick. (Mass.) 181; *Kirkland v. Oates*, 25 Ala. 465; *Merriweather v. Taylor*, 15 Ala. 735; *Bell v. Teague*, 85 Ala. 211, 3 So. Rep. 861.

8. On this theory, that partial performance by the construction company and the acceptance of the plant so partially completed and the use thereof by the Florence company raises up an implied contract on the part

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of the latter to pay for the work done and the materials furnished, the complainant is entitled to a money recovery, even if it be assumed that the original contract provided for payment in bonds only, against the defendant; and as an incident of the transaction, involving the facts alleged in the bill, an inchoate lien attached to such of defendant's property as comes within statutory terms in favor of the complainant, which, if perfected as provided by law, may be enforced by bill in chancery.—Code, § 3040.

9. If it were necessary to go into the question at all on this appeal, we should be inclined to hold that the primary obligation of the defendant under the express contract was to pay the construction company \$26,000 in money, that the bonds were in the first instance to be issued to the latter company only as collateral security for the payment of this money, or as a means of raising the money for application to the debt, that whether they should ever be taken in payment depended upon an election on the part of the construction company so to do, and that so far from such election having been made, the present bill and its leading purpose to enforce a money claim by subjecting property to its satisfaction may be considered an efficacious and binding election, conditioned only on complainant's right to make it—a right which, as has been indicated, we should hold he had—on the part or in behalf of the construction company not to accept the bonds in payment at all.

10. The contract involved here was entered into, the work and materials for which a lien is sought to be enforced were done and supplied, the lien therefor attached and was perfected, if perfected at all, and the present bill to enforce the lien was filed prior to the act of February 12, 1891, providing for mechanics' and materialmen's liens and repealing certain sections of the Code of 1886. Acts 1890-91, p. 578. The right now asserted is not affected by that act. If it existed at all, it was then a vested right, which a repeal of the statute could not destroy or impair, and which it would not be held to impair, if that were within legislative competency, in the absence of an indication of a legislative purpose to give it retrospective operation; and it is now to be worked out and effectuated under the laws of force when the suit was commenced.

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11. It is to be assumed, in the absence of any averment to the contrary, that the construction company was authorized by its charter to enter into and perform the contract involved in this case.

What we have said will suffice to indicate the grounds of our conclusion, that the decree overruling the several demurrers to the bill insisted on in argument is free from error.

Affirmed.

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*Action by Employé of a Railroad to Recover Damages for
Personal Injuries.*

1. *Impeachment of party's own witness; right to refresh his memory.*—

A party can not impeach his own witness by showing that he is unworthy of belief, or by proving that he has made contradictory statements, but he may refresh his memory in a proper way; and it is not error for the court to permit the plaintiff to ask his witness, for the purpose of refreshing his memory, if he did not testify differently on a former trial.

2. *American mortality tables as evidence.*—In an action against, a railroad company by an employé, to recover damages for personal injuries, the American tables of mortality are admissible to show plaintiff's expectancy of life.

3. *Charge as to duties of engineer.*—In an action against a railroad company by an employé to recover damages for personal injuries, it was shown that the plaintiff was the engineer on a switch engine; that under the orders of the assistant yard master, who was his superior, he was moving a train from the main track; that by reason of the switch being left open by a brakeman on another train of the defendant, plaintiff's engine left the main track, and collided with another train on a side track. The plaintiff testified that before reaching the switch he saw the safety signal, that he was running between five and six miles an hour; that when he noticed that the switch was open, and a collision with the train standing on the side track was inevitable, by reason of the switch being improperly turned, he reversed his engine, sanded the track, and did all he could to avert the collision. The brakeman, who left the switch open, testified on behalf of the defendant that when he first saw the plaintiff's engine,

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after placing the switch, it was only a car length therefrom, that he at once signalled the plaintiff, and started to throw the switch, but did not have time to do so, the plaintiff's engine being run at between sixteen and seventeen miles an hour. *Held*, that a charge, that "if the plaintiff kept the best lookout for switches and obstructions on the track he could, consistent with his other duties to watch the signals and manage the engine, if such other duties were of equal importance, this would not be negligence," though incomplete, is easily understood, when considered in connection with the evidence, is not calculated to mislead, and the giving of it is not error.

4. *Charge as to plaintiff's negligence.*—A charge which instructs the jury that, although the plaintiff was guilty of negligence, "if the jury believe from the evidence that this negligence did not contribute to plaintiff's injury," it will not prevent his recovery, asserts a correct proposition, and is properly given.

5. *Charge as to evidence of brakeman not setting switch.*—A charge, that if the brakeman of defendant who left the switch open, by reason of which the collision occurred resulting in the plaintiff's injury, "knew of plaintiff's peril in time to have prevented the plaintiff's injury, and could have prevented it by using all the means at his command, but negligently failed to apply the means, and if the injury resulted to plaintiff by reason of such failure, this would amount to reckless or wanton conduct, and would entitle the plaintiff to recover, whether the plaintiff was negligent or not, provided plaintiff did all he could to prevent the injury and to save himself from harm, after he became aware of his peril," asserts a correct proposition of law, and is properly given.

6. *Inconsistency in charges given by the court.*—If, at the request of one of the parties to a suit, the court gives a charge which is inconsistent with the general oral charge to the jury, and which is erroneous, the party in whose favor the charge is given can not take advantage of the error to the prejudice of the other party to the suit.

7. *General exception to the oral charge of the court.*—A general exception to the whole of the court's oral charge to the jury is not well taken, if any portion of the oral charge, so excepted to, announces correct propositions of law.

8. *Evidence of reckless, wanton or willful negligence can be introduced in a complaint which avers simple negligence.*—Evidence of reckless, wanton or willful negligence can be introduced on the trial of a cause in which the complaint avers only simple negligence; and whether the evidence thus introduced was sufficient to authorize the plaintiff to recover, notwithstanding he may have been guilty of contributory negligence, is a question for the jury.

9. *Averment of wanton or willful negligence not sustained by proof of simple negligence.*—An averment in the count of a complaint, that the injury complained of was caused by the wanton, reckless or willful negligence of the defendant, is not sustained by evidence of simple negligence; to authorize a recovery under such a count, it is necessary to prove the negligence as averred.

10. *Contributory negligence no defense for willful negligence.*—A plea averring that the plaintiff was guilty of negligence which proximately contributed to his injury complained of, presents no defense to a count which alleges that the injuries were inflicted by the wanton, reckless or willful misconduct or negligence of the defendant.

11. *Contradictory statements by party to suit.*—Admissions, which are relevant and material to the issue, made by a party to the suit are always admissible against him; and when the party testifies on a subsequent trial differently from what he did on a former trial, it is competent for the adverse party to give in evidence his statement on the former trial, and it is the duty of the jury to consider both statements in connection with the explanation, if any is made, in the light of all the evidence, to determine which is true.

12. *Charge on a portion of the evidence.*—A charge which singles out any particular part of the evidence and bases a conclusion of law upon it, gives undue prominence to this portion of the evidence, is calculated to mislead the jury, and is properly refused.

13. *Charges ignoring any tendency of the evidence properly refused.*—If in an action to recover damages for personal injuries, there is evidence which tends to show that plaintiff failed to exercise proper preventive effort, after his peril was discovered, a charge which ignores this tendency of the evidence is properly refused.

14. *Refusal of charges which are mere repetition of former charges.*—A court commits no error in refusing charges requested by parties to a suit, which are mere repetitions of charges already given by the court; and a mere variation in the use of words, which in no way change the meaning or assert different principles from those already given, do not compel the giving of such charges.

15. *Impeachment of witness by contradictory statements.*—When it is shown that a witness on his examination makes statements different from those made on a previous examination, these statements only tend to impeach, and when a witness makes an explanation of the different statements, the jury are not authorized to capriciously reject such explanation.

16. *Same.*—Charges which instruct the jury that a contradiction of a witness by himself constitutes an impeachment, and which ignores an explanation by the witness of such contradiction, tend to mislead the jury and are properly refused.

17. *Argument of counsel to jury.*—Great latitude must be allowed to counsel in addressing the jury, but his argument should be confined to the evidence before them, and the legitimate inferences to be drawn from that evidence; and when counsel transcends this limit, the court should interfere, on proper objection made, and the failure to do so is a reversible error.

18. *Same; general objection thereto.*—A general objection to statements made by counsel in his argument, some parts of which were authorized by the evidence, is properly overruled; the court not being bound to separate the legal from the illegal.

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APPEAL from City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

This was an action on the case brought by the appellee against the appellant; and sought to recover damages for personal injuries alleged to have been suffered by the plaintiff through the negligence of the defendant or its employés, while the plaintiff was in the employ of the defendant as an engineer.

The complaint originally contained but one count; but two others were added by way of amendment. The second count was afterwards withdrawn. The negligence charged in each of the remaining counts was, that of a person in charge of a switch in opening the same and failing to close it, so that the engine upon which the plaintiff was the engineer ran through the switch and collided with a train standing on another track. The last count, which is numbered three, also avers that the employé of the defendant, who was in charge of said switch, after knowledge of the plaintiff's danger, failed to exercise proper diligence to avert it. The defendant filed four pleas, pleading the general issue and contributory negligence; and the plaintiff took issue on each of the four pleas. The facts upon which the case was tried, as shown by the bill of exceptions are as follows:

On July 23, 1890, the plaintiff was in the employ of the defendant as an engineer on a switch engine, and was in the yard of the defendant at Birmingham, Alabama, his duty being to make up trains and distribute cars. The freight train numbered 110 had come in ahead of freight train No. 74, and was standing on the main line of the defendant, the engine having gone to the round house. It was the plaintiff's duty to clear the main line of train 110 before freight train 74 came in; so that No. 74 could occupy the main line. No. 74, however, came in before 110 was switched off the main line. The assistant yard-master of the defendant, who was the plaintiff's superior, gave the signal to plaintiff, to signal the incoming train to stop at the switch at Valley Creek crossing, which was done, and train No. 74 stopped there. The plaintiff then went on the main line with the switch engine, and coupled on to the cars which comprised train 110 for the purpose of taking them off the main line; and then backed down the main line. As the plaintiff was backing his train, and when he had reached

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a point on the main line between the A. G. S. crossing and the Valley Creek switch, he was signalled by the assistant yard-master to go on down the main line instead of going on the side track as had been his custom. One Hickerson, who was a brakeman on train 74, and whose duty it was to throw the switch, as soon as his train had stopped, ran to the switch and threw it so as to connect with the north main line instead of the south. This was done but a few minutes before the plaintiff passed with his train intending to go down the south main line as directed by the assistant yard-master, but on account of the switch being thrown by the switchman Hickerson, instead of going down the main line as was directed and intended, his train was diverted to the side track on which freight train 74 was standing, and the two trains collided. Just before the collision, and when the plaintiff saw that it was inevitable, he reversed his engine, sanded the track, and did all that he could do to stop his train, and then leaped from the engine. He fell, his back striking against the switch stand, and he received the injuries for which he now brings this action.

The plaintiff testified that when he got to the A. G. S. crossing he looked at the Valley Creek switch and it showed "white," which was an indication that he could proceed with safety along the main line past that switch. The plaintiff admitted that on the former trial he had testified that he did not look at the Valley Creek switch after leaving 14th Street, and accounted* for the conflict of the two statements by stating that "he was weak and nervous on the former trial." He also stated that before reaching the A. G. S. crossing he told his fireman to look back, and his fireman told him all right, to "back up," and that it was after this that the assistant yard-master gave the signal to go on down the south main line so as to clear the switch at Valley Creek. At the time the train went through Valley Creek switch, which resulted in the injury complained of, the plaintiff testified that the train was running between 5 and 6 miles a hour, while the witness Hickerson testified that it was running between 16 and 17 miles an hour.

The switchman, Hickerson, who was a witness introduced by the defendant, testified that after he had thrown the switch for the north bound main line, that he first discovered the engine on which the plaintiff was running

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when it was only about a car length from the switch, and that this was the first knowledge he had of the switch engine coming up from 14th Street; that as soon as he saw it he signalled to the switch engineer, and started to the switch at the same time to throw it the other way, but that he did not have time to do it. He testified that the last time he noticed the switch engine, just before he saw it a car length from the switch, it was standing at 14th Street, and that after he threw the switch he stood with his back to the north, the direction from which the engine was coming, waiting for the train to come on towards the switch, but he did not hear the engine as it approached because of the noise of the furnaces and mills around where he was standing.

The first assignment of error was based on the court's overruling the defendant's objection to the following question propounded to the witness Will Hill, who had testified that he was the fireman on the engine with the plaintiff at the time of the accident: "Didn't you testify on your former examination that 'I looked back as we were coming to the crossing, I told him to look back, there was a train coming, then I looked back and told him it was all right, and I went down and commenced throwing coal. The switches were all set for the south bound track. I saw they were set for the south bound track when we crossed the A. G. S. crossing, and I could not say that any of those switches were changed after we crossed the A. G. S. crossing?'" The defendant objected to this question because it called for hearsay evidence, and because the defendant could not impeach its own witness. The court overruled the objection, and stated that it would permit the question to be asked and answered for the purpose of refreshing the memory of the witness. To this ruling of the court the defendant duly excepted.

The second, third and fourth assignments of error present the same questions as the above. The sixth assignment of error was the admission, against the appellant's objection and exception, of the American tables of mortality in evidence, to show the plaintiff's expectancy of life. All the other assignments of error are directed to the court's giving and refusing to give several charges asked, and the court's overruling the defendant's motion for a new trial.

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The court in its oral charge instructed the jury as follows: "So you will say whether Hurt was guilty of negligence. Taking into consideration the rules of the company, such as were brought to his knowledge, and also the circumstances generally surrounding him, to see whether he ought to have run the train of which he was engineer at a slower rate of speed, or to have stopped it, or to have kept a better lookout, and if you should find that he was negligent in any of these matters, and that his own negligence brought about his own injury, or helped to do it, proximately, then he must not recover, even though the switchman was negligent, unless you believe the act of the switchman was willful, wanton or reckless, not merely negligent—something worse."

"You will consider whether you find that the plaintiff was negligent in failing to keep a lookout, and running his trains too fast across that switch under the circumstances, and you will also consider whether Hickerson was conscious of the danger which threatened the plaintiff by reason of the switch being thrown wrong, and whether being so conscious of it, he could have turned the switch, so as to save the plaintiff, and the plaintiff's train, and prevent the collision, and whether he had time to do it, or whether he willfully and with reckless disregard to the consequences, allowed the switch to remain open, and let the plaintiff's train run into the other train; and in such case, if you find that the plaintiff did what he could to prevent the injury to himself after he saw his danger, he may recover." The defendants separately excepted to each of these portions of the court's oral charge to the jury, and also excepted to the whole of the court's general charge as given.

At the request of the plaintiff, the court gave to the jury the following written charges: (1.) "If the plaintiff kept the best lookout for switches and obstructions on the track he could, consistent with his other duties to watch for signals and manage the engine, if such other duties were of equal importance, this would not be negligence." (2.) "Although the plaintiff was guilty of negligence in failing to stop his train before crossing the track of the Alabama Great Southern railroad, if the jury believe from the evidence that this negligence did not contribute to plaintiff's injury, it will not disentitle him to recover." (3.) "If Hickerson knew of plaintiff's

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peril in time to have prevented the injury, and could have prevented it by the use of the means at his command and negligently failed to apply the means, and if injury resulted to plaintiff by reason of such failure, this would amount to reckless or wanton conduct and would entitle plaintiff to recover whether plaintiff was negligent or not, provided plaintiff did all he could to prevent the accident and save himself from harm after he became aware of his peril." The defendant separately excepted to the giving of each of these charges; and also separately excepted to the court's refusal to give, among others, each of the following written charges requested by it: (5.) "Unless the jury believe that the witness HICKERSON was so negligent that his conduct was the legal and moral equivalent of willful or intentional wrong, they must find for the defendant, if they believe that plaintiff was guilty of negligence which proximately contributed to his injury." (8.) "You can not find from the evidence that the defendant or defendant's servants were guilty of reckless, wanton or willful conduct." (17.) "If the jury believe that the plaintiff has contradicted his testimony given on the former trial of this cause in any material particular, they are authorized to consider this as an impeachment of plaintiff's testimony." (21.) "If the jury believes that the plaintiff testified on the former trial of this cause that he didn't see how the switch was after he left 14th Street, and that he testified on this trial that he saw that it was right for the south main line at or about the A. G. S. crossing, they may consider these contradictory statements as an impeachment of the plaintiff." (22.) "If the jury believe that the plaintiff testified on the former trial of this cause that he didn't notice this switch after he left 14th Street, and on this trial that he noticed the condition of the switch at the A. G. S. crossing, the jury are authorized to disregard his testimony entirely, if they believe that he knowingly did so."

Counsel for the plaintiff, in his closing remarks to the jury, said: "I think so far as the witness Will Hill is concerned, that his whole manner relieves me of saying anything about him. I think there is a case for the criminal courts to deal with." The defendant excepted to these remarks, and asked the court to exclude them from the jury, and instruct them to disregard them.

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The court refused to do this, and the defendant duly excepted. The same counsel also made the following statements in his closing remarks to the jury: "I asked Dr. Wilson if he had heard of a case where a man got well after his law suit was settled, and he said he never had; and I asked him if he had ever read of any such case, and he said he had in some book in his office. Didn't I ask him to get that book as soon as he got off the witness stand, and bring it back here, and he has not come back to this hour with that book showing such a case?" The defendant moved the court to exclude these statements from the jury, and to charge them to disregard the same, and duly excepted to the court's refusal to do so.

There was judgment for the p'aintiff, assessing his damages at \$3,000. The defendant appeals; and assigns as error the several rulings of the trial court to which exceptions were reserved.

HEWITT, WALKER & PORTER, for appellant. (1.) The Tables of Mortality were improperly admitted, because the court takes judicial knowledge of them, and the evidence showed that they were not based on the lives of the class of men to which appellee belonged.—*McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401; 5 So. Rep. 120; *Highland Ave. & Belt R. R. Co. v. Walters*, 91 Ala. 514, 8 So. Rep. 357. (2.) The first charge requested by the plaintiff should not have been given.—*Pryor v. L. & N. R. R. Co.*, 90 Ala. 32, 8 So. Rep. 55; *Western Railway v. Lazarus*, 88 Ala. 452, 6 So. Rep. 877; *Ga. Pac. Ry. Co. v. Propst*, 83 Ala. 518, 3 So. Rep. 764. (3.) The second charge given at the request of the plaintiff was erroneous.—*Taylor v. State*, 48 Ala. 157; *Gilliam v. State*, 50 Ala. 145; *Lyon v. Kent*, 45 Ala. 656; *Northington v. Faber*, 52 Ala. 4. (4.) The burden of proof was on plaintiff to show willful, wanton or reckless negligence.—*H. A. & Belt R. R. Co. v. Sampson*, 91 Ala. 560, 8 So. Rep. 778; *L. & N. R. R. Co. v. Crawford*, 89 Ala. 240, 8 So. Rep. 243; *Ga. Pac. Railway Co. v. Lee*, 92 Ala. 262, 9 So. Rep. 230; *Carrington v. L. & N. R. R. Co.*, 88 Ala. 472, 6 So. Rep. 910. (5.) The several charges requested by the defendant should have been given.—*Smith v. State*, 88 Ala. 73, 7 So. Rep. 52; *Ga. Pac. R. R. Co. v. Propst*, 83 Ala. 518, 3 So. Rep. 764;

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Pryor v. L. & N. R. R. Co., 90 Ala. 32, 8 So. Rep. 55; *L. & N. R. R. Co. v. Webb*, 90 Ala. 185, 8 So. Rep. 518; *L. & N. R. R. Co. v. Crawford*, 89 Ala. 240, 8 So. Rep. 243; *Ga. Pac. Railway Co. v. Lee*, 92 Ala. 262, 9 So. Rep. 230; *Western Railway Co. v. Lazarus*, 88 Ala. 453, 6 So. Rep. 877; *Mobile & Girard R. R. Co. v. Caldwell*, 83 Ala. 196, 3 So. Rep. 445; *Smoot v. M. & M. Railway Co.*, 67 Ala. 13; *M. & C. R. R. Co. v. Graham*, 94 Ala. 545, 10 So. Rep. 284; *Farrow v. Andrews*, 69 Ala. 97; *A. G. S. R. R. Co. v. Frazier*, 93 Ala. 45, 9 So. Rep. 303; *Agnew v. Walden*, 84 Ala. 503, 4 So. Rep. 672; *C. & W. R. R. Co. v. Bradford*, 86 Ala. 574, 6 So. Rep. 90; *North Birmingham S. R. R. Co. v. Calderwood*, 89 Ala. 247, 7 So. Rep. 360.

SMITH & LOWE, *contra*.—(1.) Under the facts of the case, the plaintiff was not guilty of negligence which contributed proximately to his injury.—*L. & N. R. R. Co. v. Hall*, 87 Ala. 708, 6 So. Rep. 277; *A. G. S. R. R. Co. v. Hawk*, 72 Ala. 112; *A. G. S. R. R. Co. v. Arnold*, 80 Ala. 604-5, 2 So. Rep. 337; *Bunting v. Hogsett*, 23 Amer. St. Rep. 192. (2.) The duty which devolves on the engineer to keep a constant lookout ahead for obstructions must be deemed performed when he maintained the best lookout he could consistent with the performance of his other duties.—*Western Railway Co. v. Lazarus*, 88 Ala. 453, 6 So. Rep. 877; *Houston Railway Co. v. Smith*, 13 S. W. Rep. (Tex.) 972; *Howard v. Railway Co.*, 19 Amer. St. 302. (3.) If the plaintiff was guilty of contributory negligence, the question of reckless or wanton misconduct on the part of the defendant, which would overcome such contributory negligence was properly submitted to the jury.

COLEMAN, J.—The action is on the case, brought by Hurt to recover damages for personal injuries, alleged to have been sustained by the negligence of the defendant, while he was in its employment as an engineer.

The court permitted the plaintiff to ask his own witness Will Hill, against the objection of the defendant, if he had not testified on a former trial, as follows: (The statement is then set out.) The court permitted the question to be asked for the purpose, as stated by the court at the time, to refresh the memory of the witness, and not for the purpose of impeachment. It is a matter

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largely within the discretion of the court, to permit a party to refresh the memory of a witness. The witness answered that he "did not remember." The general rule is, a party can not impeach his own witness, by showing that he is unworthy of belief, or by proving that he has made contradictory statements, but he may refresh his memory in a proper way. This is frequently done by showing the witness a memorandum, and it is permissible to do so, by calling the attention of the witness directly to some particular circumstance or statement. It does not appear that it was used for any other purpose, and in this case, the question elicited no response, unfavorable to the defendant. A party is not held bound by any statement of fact made by his own witness, if he can by other evidence show that in truth the statement was incorrect. The deportment of a witness on the stand, his manner of testifying, may be considered by a jury in weighing his evidence, and is a legitimate subject for argument by either side. A witness may discredit his own testimony by his manner when testifying. There was no error in the ruling of the court, in the several assignments of error, involving this question. The court did not err in admitting the American Tables of Mortality.—*Mary Lee Coal & Rwy. Co. v. Chambliss*, 97 Ala. 171, 11 So. Rep. 897; *Ala. Gold Life Ins. Co. v. McDonnell*, 85 Ala. 401, 5 So. Rep. 120.

A great many assignments of error are based upon the charges given, and the refusal to charge as requested by the defendant. The three charges given for the plaintiff are free from error. The first asserts the proposition, that "if the plaintiff kept the best lookout for switches and obstructions on the track he could, consistent with his other duties to watch for signals and manage the engine, if such other duties were of equal importance, this would not be negligence." The charge is not complete, but considered in connection with the evidence, it is easily understood, was not calculated to mislead and was not abstractly erroneous. The second charge given for plaintiff asserted that negligence on the part of the plaintiff, which did not contribute to his injury, would not prevent a recovery; and the third, asserted the proposition, thoroughly established in this court, that if defendant knew of plaintiff's peril in time to have prevented the injury, and could have prevented it by the use of

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means then under its control, and negligently failed to apply the means to prevent the injury, and plaintiff was injured in consequence of such negligence, he would be entitled to recover, notwithstanding plaintiff may have been guilty of negligence, provided plaintiff did all he could to prevent the accident and save himself from harm after he became aware of his peril. Authorities collected in *L. & N. R. R. Co. v. Webb*, 97 Ala. 308, 12 So. Rep. 375.

The portions of the oral charge excepted to involve very much the same principles of law, as those involved in the charges given for the plaintiff, and which have been declared to be free from error. The argument against the oral charge of the court is not insisted upon so much because of any unsoundness in the propositions of law asserted, as for their qualifying effect upon another charge of the court, given at the request of the defendant, after the oral charge was concluded. It is insisted that the ruling of the court is inconsistent in this, that in the oral charge, the court left it with the jury to say, whether there were facts in evidence, which showed that plaintiff was guilty of proximate contributory negligence, and in an affirmative charge the court instructed the jury at the request of the defendant, as a matter of law, "that if the jury believed the evidence, the plaintiff was guilty of negligence which proximately contributed to his injury." We have held that there was no error in the portions of the oral charge excepted to, and if we are correct, and if there is repugnancy in the oral charge and the affirmative charge given at the request of the defendant, it must be that the error lies in the charge given at the request of the defendant. If there was error committed by the court, in favor of the defendant and at his request, the defendant can not take advantage of it to the prejudice of the plaintiff. The statute, section 2754 of the Code, prohibits the court from charging upon the effect of evidence, unless required to do so by one of the parties, and if upon the evidence in this case, the court had charged the jury, *ex mero motu*, that plaintiff was guilty of proximate contributory negligence, and the verdict had been for the defendant, we are not prepared to say it would not have been reversible error. Code, § 2754, and authorities cited in Code. Employés can not be held responsible for the failure to perform one duty, when such failure resulted from the necessary observ-

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ance of another, of equal importance and equally binding upon him. Some portions of the oral charge excepted to, that which declared plaintiff's right to recover, although he may have been guilty of contributory negligence, was undoubtedly free from error, and the exception going to the whole, for this additional reason, was not well taken.

Under the written instruction of the court given at request of defendant the jury were required to find, that plaintiff was guilty of proximate contributory negligence. The only issue of fact left open to be ascertained by the jury, under this charge of the court, was whether defendant was guilty of such wanton or willful negligence, or its equivalent, as to authorize a verdict for the plaintiff although he may have been guilty of proximate contributory negligence. In the case of *L. & N. R. R. Co. v. Webb*, 97 Ala. 308, 12 So. Rep. 375, it is said: "We have often held that, if plaintiff's peril was discovered in time to avoid the injury by the exercise of due care on the part of the defendant and the injury was the result of the failure to perform its duty in this respect, plaintiff would be entitled to recover, although he may have been guilty of culpable negligence in the first instance." We further held that, "the practice which prevails in this State authorizes the introduction in evidence of reckless, wanton, or willful negligence, under a complaint which avers only simple negligence; and a recovery may be had upon such proof, although the evidence may sustain a plea of simple contributory negligence." The authorities are collected in the *Webb Case*, *supra*.

The first count of the complaint charged simple negligence as distinguished from wanton or willful negligence, or its equivalent, and under the foregoing authorities, it was proper to admit evidence to show that defendant negligently failed to use preventive effort after discovering plaintiff's peril, and that such negligence caused the injury. Whether the evidence was sufficient to authorize the plaintiff to recover under the first count, notwithstanding plaintiff may have been guilty of contributory negligence was properly left to the jury. The gravamen of the third count of the complaint is, that defendant knew of plaintiff's danger, "and could by the exercise of proper diligence have prevented his injuries as aforesaid, which they negligently failed to do." The

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negligence, here averred is the equivalent of wanton or willful misconduct. To authorize a recovery under this count, it was necessary to prove the negligence averred. Proof of simple negligence, that is the failure to exercise ordinary care, would not sustain this count of the complaint. A plea to such a count, which avers as a defense that plaintiff was guilty of negligence which proximately contributed to his injury does not present a complete answer, for plaintiff may recover notwithstanding his contributory negligence upon proof that defendant was guilty of wanton or willful injury or such negligence as to be the equivalent of willful or wanton wrong. The plea does not answer the whole complaint.—*A. G. S. R. R. Co. v. Frazier*, 93 Ala. 45, 9 So. Rep. 303; *M. & E. Railway Co. v. Stewart*, 91 Ala. 421, 8 So. Rep. 708; *L. & N. R. R. Co. v. Watson*, 90 Ala. 68, 8 So. Rep. 249.

Instead of objecting to the plea because of its insufficiency, the plaintiff joined issue upon it. The rule is, that where issue is joined upon an insufficient plea, it becomes an issue to be tried by the jury, and although it may be immaterial, or show no bar to a recovery, the court has no discretion but must receive evidence, if offered, in support of the plea, and if sustained by the proof, the defendant is entitled to have the issue found in his favor.—*Farrow v. Andrews*, 69 Ala. 96; *Agnew, Adm'r. v. Walden & Son*, 84 Ala. 503, 4 So. Rep. 672; *Memphis & Charleston R. R. Co. v. Graham*, 94 Ala. 545; 10 So. Rep. 283.

The court, as we have stated, charged the jury at the request of the defendant, as a matter of law, that plaintiff was guilty of negligence, which proximately contributed to his injury. It thus determined that the plea of the defendant to the third count of the complaint was sustained by the proof. Although insufficient as a plea, issue having been joined upon it, and the defendant, as judicially determined by the court, having sustained the plea by uncontroverted evidence, to be consistent, it would appear that the court was bound to charge the jury at the request of the defendant, that the plaintiff could not recover under the third count of the complaint.

We are of opinion the court charged the jury too favorably for the defendant, when it declared, as a matter of law that plaintiff was guilty of contributory negligence. We think under one phase of the evidence, the

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jury might have found that plaintiff was not guilty of contributory negligence. If after crossing the Ala. Gr. So. R. R. track, plaintiff looked and saw that the switch was properly set, and he received orders from the yard-master to move down the track, and if it was equally incumbent on him to attend to his engine, and watch for signals, and he "kept the best lookout he could for the switches, consistent with his other duties of equal importance," and was also informed by his fireman that the switch was all right, questions of fact to be determined by the jury, a failure on his part to discover and know exactly when the switch was turned, would not, as a matter of law, necessarily amount to contributory negligence. Under the evidence, it was a question for the jury. If, therefore, the court erred in favor of the defendant, in giving the affirmative charge at its request, that plaintiff was guilty of contributory negligence, the error can not be visited upon the plaintiff, if in fact under the evidence, the court ought not to have thus charged the jury. The principle of law decided in the case of *Kansas City, Memphis & Birmingham R. R. Co. v. Sanders*, 98 Ala. 293, is directly in point.

Admissions which are relevant and material to the issue made by a party to a suit, whether made as a witness on the stand or elsewhere, are always admissible against him. He is not concluded by them, unless they induce action, so as to stop him afterwards, but he may explain, or show that in making the statement, he was mistaken. Where a party testifies on a subsequent trial different from that given on a former trial, it is competent for the adverse party to give in evidence his statement on the first trial, and it is the duty of the jury to consider both statements in connection with the explanation, if any is made, in the light of all the evidence, and determine which is true. A charge which singles out any particular part of the evidence and bases a conclusion of law upon it, gives the fact thus emphasized undue prominence, and is calculated to mislead the jury. Such charges generally are argumentative and should be refused. The charges asked by defendant in regard to the former admissions of the plaintiff are faulty in this respect, and the court did not err in refusing them.

Many of the refused charges ignore that phase of the evidence (and there was such evidence by the plaintiff),

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which tended to show that defendant failed to exercise proper preventive effort, after plaintiff's peril was discovered. For this reason they were properly refused. We need not specify them. Section 2756 of the Code, which provides that "charges moved for by either party in writing, must be given or refused in the terms in which they are written," was not intended to license either party to move for charges *ad infinitum*. A court will not be in error for refusing charges which are mere repetitions of charges which have been given, and a mere variation in the use of words, which "hideth counsel," and which in no way change the meaning or assert different principles from those given, will not affect the rule. Some of the charges asked are subject to this criticism.

Charge No. 5 refused by the court is of that character. The defendant had received the benefit of the principle of law asserted in this charge in four separate charges, given by the court at the instance of the defendant, and in the oral instructions given by the court. The charge (No. 5) may be subject to the further criticism, that it refers to the jury to determine what is the "legal" equivalent of willful or intentional wrong; but aside from this, it is a mere repetition of instructions which were given to the jury. No possible injury can result to plaintiff by the rule of construction we place upon the statute, for it is now provided that charges "given" are to be taken out by the jury, while those refused are to be retained by the clerk.—Acts of 1889-90, page 90, amending section 2756 of the Code. It is manifest, then, that the defendant received the benefit of charge No. 5 in the charges given at its request, and was not injured by the refusal of the court to give charge No. 5.

Charges 17 and 21 are misleading, and also state the proposition in language too strong. When it is shown that statements made by a witness on his examination are different from those made on a previous examination, this is evidence tending to impeachment.—*Harris v. State*, 96 Ala. 24; 11 So. Rep. 255. but when the witness makes an explanation of the different statements, the jury would not be authorized capriciously to reject the explanation. The charges should not have ignored the explanatory evidence. Contradictory statements tend to impeachment, but do not as matter of law

amount to an impeachment. If a statement is intentionally made, the witness knowing at the time it is untrue, a jury would be authorized to reject the testimony of the witness entirely.

We are of opinion that charge 22 is involved and is subject to the same criticism. Leaving off the last phrase of the charge, "if they believe he knowingly did so," there is but little difference, if any, in the principle asserted in this charge and in 17 and 21 *supra*. If the jury believed that on either examination the witness stated that as true which he knew to be untrue, in regard to a material matter, the jury would be authorized to discredit the witness altogether, and it would not be an invasion of their province to so instruct them, but that is not the proposition asserted by the charge. The witness in the case at bar knew at the time of his last examination he had made a different statement on his first examination, and he undertook to account for the difference, and to explain why he made a mistake on his first examination. If the jury were satisfied with the explanation, although they may have believed that the witness knowingly and intentionally testified as he did on his first examination, yet if they believed he made an honest mistake, which he satisfactorily explained, the mere difference of the two statements would not in law justify the court to instruct the jury as requested. The charge as framed ignores the explanatory evidence, and at least was calculated to mislead the jury, and possibly invaded their province. There was no error in refusing it. "Charges should be clear and of easy interpretation." *Hughes v. Anderson*, 68 Ala. 280; *Harmon v. McRea*, 9-1 Ala. 401, 8 So. Rep. 548.

Some part of the statements of counsel to the jury in his closing argument, to which exception was taken, was authorized by the evidence, and the exception going to the entire part, that which was authorized as well as that not justified by the evidence, the court was not bound to separate the legal from the illegal, but was justified in refusing the motion as made.

A fair and satisfactory discussion of the question as to how far counsel can go in the argument of evidence before a jury, without transgressing legitimate limits, may be found in the case of *Mitchum v. The State*, 11 Ga. 615, and *Tucker v. Henniker*, 41 N. H. 317. The doctrine

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is thoroughly established in this State, and its limitations have been judicially fixed. See the following authorities: *Nelson v. Shelby Manf. & Imp. Co.*, 96 Ala. 515, 11 So. Rep. 695; *Lunsford v. Dietrich*, 93 Ala. 565, 9 So. Rep. 308; *Billingsley v. State*, 96 Ala. 126, 11 So. Rep. 409; *Cross v. State*, 68 Ala. 476; *Jackson v. Robinson*, 93 Ala. 157, 9 So. Rep. 391; *Railroad Co. v. Orr*, 91 Ala. 548, 8 So. Rep. 360.

There is no error in the record, and the case must be affirmed.

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Application for Mandamus.

1. *Construction of constitutional provisions.*—Constitutional provisions are to be expounded in the light of conditions existing at the time of their adoption, in connection with former provisions and historical facts relating to the origin of our political institutions and the practice under them.

2. *Distribution of powers.*—All powers which are, by the constitution itself, expressly or by necessary implication, referred to the exclusive exercise of one of the several departments of the government, must be exercised by that department, and can not be, by legislation, conferred elsewhere.

3. *Nature of powers conferred not determinative of the department by which they are to be exercised.*—The fact that certain powers and duties conferred by legislation partake of a legislative, executive or judicial nature, is not determinative of the department of the government by which such powers and duties are to be exercised.

4. *Same.*—The constitutional provision in regard to the distribution of the powers of government into three departments, and forbidding the exercise by an officer of one department of any act properly belonging to another, "was not intended to declare that every act pertaining to government, and the regulation of the social and property rights of the citizen, should be exercised exclusively by the legislative, executive, or judicial department, or some member of it, according as the act possessed a legislative, executive, or judicial character."

5. *Power of appointment to office not inherently an executive function.*—The power to appoint to office is not inherently an executive function; but by the policy of our government has been distributed among the several departments of state.

101	51
102	363
101	51
118	48
101	51
130	161
101	51
132	46
101	51
138	173

6. *Power of Governor to appoint to office.*—The Governor, as the chief executive, has no inherent right to appoint to office, and this function belongs to him only when conferred by statute.

7. *Constitutionality of the act to establish a board of police commissioners for the city of Birmingham.*—The act approved December 12, 1892, "To establish a board of commissioners of police for the city of Birmingham, Alabama," which confers upon the probate judge of Jefferson county, the county in which the city of Birmingham is situated, the power to appoint the commissioners, is not unconstitutional and void by reason of conferring upon a member of the judicial department the power of appointment.

8. *Legislative enactments presumed to be constitutional.*—Legislative enactments are always presumed to be in accord with the constitution, and will not be declared unconstitutional and void, unless it clearly appears that they offend some provision of the constitution.

9. *The act to establish a board of police commissioners of the city of Birmingham not unconstitutional, as denying to the city the right of local self-government.*—The act "To establish a board of commissioners of police for the city of Birmingham," which confers on the probate judge of Jefferson county the power to appoint the commissioners, but does not in express terms provide that the commissioners so appointed shall be residents of the city of Birmingham, is not unconstitutional because of such omission; the controlling purpose of the act being to provide an efficient enforcement of the police powers of Birmingham, and the intention that the commissioners to be appointed shall be residents of the said city being manifest on the face of the statute itself. (COLEMAN, J. concurring in the conclusion, but not in the reason therefor.)

10. *Legislative enactments; when they go into operation.*—Legislative enactments and their provisions go into immediate operation, unless by force of some general law, or some provision contained in the act itself, the operation is postponed, and the special provision fixing such postponement must be in terms so clear and certain as to admit of no other rational interpretation.

11. *Termination of the tenure of former officers upon appointment under a new statute.*—Under the act establishing the board of police commissioners for the city of Birmingham, which provided for the appointment of commissioners by the probate judge of Jefferson county on a certain day, the tenure of the several police officers serving at the time of the passage of said act terminated so soon as the police commissioners were appointed by the probate judge; their appointment necessarily annulling the power under which the former police officers held.

12. *Act not unconstitutional because the title fails to express the object to determine the terms of the police officers.*—The title of a legislative enactment as "An act to establish a board of commissioners of police for the city of Birmingham, Alabama," implies the insertion in the act of all powers reasonably necessary to the efficient

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administration of the police department of the city by the police to be appointed, which includes the power to appoint police officers; and the fact that this power to appoint is effected by cutting off the terms of the incumbents does not render the act unconstitutional, because that object is not expressed in the title; the title of the act being sufficiently comprehensive to include this result.

13. *Duty of the mayor of the city.*—It was the duty of the mayor of the city to take judicial notice of the appointment of the commissioners, their organization and selection of proper officers, when properly certified to by him; and he could not lawfully refuse to administer the oath of office to an officer appointed by the commission, which appointment was certified to him, nor had he the right to inquire into the regularity of said appointment.

14. *Ratification of appointment.*—There can be no ratification by the appointing power of the prior appointment of a public officer; but if the person has been informally appointed, or one duly appointed has failed to qualify, the appointing power can only fill the vacancy.

APPEAL from the City Court of Birmingham.

Heard before the Hon. H. A. SHARPE.

The proceedings in this case were instituted by a petition filed by the appellee, T. C. McDonald, in the city court of Birmingham, in which he prayed for a writ of *mandamus* to be issued to the appellant, David J. Fox, as mayor of the city of Birmingham, commanding him to administer to the petitioner the oath of office as chief of police for that city.

The act approved December 12, 1890, establishing a new charter for the city of Birmingham, provided in its 18th section that the board of mayor and aldermen should appoint the chief of police, and such other officers as they thought necessary for the enforcement of good government of the city, and that this board should have control over such officers. Section 19 of said act defined the powers of the chief of police of the city of Birmingham.

On February 19, 1890, the municipal council of Birmingham adopted a code of city ordinances. Section 46, chapter IV of said code, relating to the officers and their terms, provides that the chief of police, and other police officers, shall be elected annually by the board of mayor and aldermen, to serve at the will of said board for one year, or until their successors are elected and qualified, beginning on January 1st, of each and every year. Section 47 of the same chapter requires that the said officers shall be residents and qualified electors of

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said city. Section 48 requires that each of the officers named in section 46 "shall, before entering upon the discharge of their respective duties, and within five days after election, appear before the mayor and take and subscribe an oath well and truly to perform the duties of their respective offices to the best of their skill and ability." Section 60 prescribes that the mayor "shall have the power, and it shall be his duty, to administer the oath of office to each of the officers of the city." These several sections of the said code of the city of Birmingham were in force December 12, 1892, when "An act to establish a board of commissioners of police for Birmingham, Alabama," was approved and became a law. Acts 1892-93, p. 177. This last act referred to consists of five sections. Section 1 provides for the appointing of a board of commissioners of police for the city of Birmingham by the probate judge of Jefferson county, consisting of five persons. The first appointment to be made at the first regular meeting of the board of mayor and aldermen in the month of January, 1893, or immediately thereafter, and regulates the terms of officers appointed. Section 2 provides for future appointments and for the filling of vacancies. Section 3 prescribes the oath of office which the commissioners must take before entering upon the duties of the office, and directs that the oath shall be entered upon the minutes of the proceedings of the board, and the original filed in the office of the city clerk. Section 4 prescribes the powers of the police commissioners, and is as follows: "That the board of police commissioners thus appointed and qualified shall have the exclusive power, and it shall be their duty, to appoint a chief of police and such other police officers and policemen as may be prescribed by city ordinance. The salary of such officer and policeman to be prescribed by city ordinance, and shall not be increased or diminished during their respective terms. This power shall extend to unexpired as well as to regular terms. They shall keep a record, and one of said board shall act as clerk thereof, keeping a complete record of all their proceedings. They shall hold a stated meeting each month, and such other meetings as the public interest may from time to time require. Three shall constitute a quorum, with power to transact business. They shall exercise full directions and control of

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the officers and members of the police force in conformity to existing laws and ordinances, and such as may be made in the future applicable to the subject." Section 5 relates to the removal of police officers or policemen from office by the board of commissioners.

It is shown by the record that on January 4, 1893, that being the first meeting of the mayor and aldermen [of Birmingham for that year, M. T. Porter, the probate judge of Jefferson county, appointed five police commissioners as required by the "Act to establish a board of commissioners of police for the city of Birmingham," who took the oath prescribed, and that the commissioners thus appointed met and organized. After the first appointment several vacancies occurred by resignation, but they were filled by the probate judge in accordance with the said act. On March 6, 1893, the board of commissioners of police elected the petitioner, T. C. McDonald, to the office of chief of police, at the same time electing other policemen. At the meeting of the board of police commissioners on March 30, 1893, there was adopted the following resolution: "Be it further resolved, that the president and secretary be and they are hereby instructed in the name of the commissioners to formally report to the mayor and aldermen of Birmingham on the first Wednesday night of April, 1893, that this commission, on March 6, 1893, elected the following officers and patrolmen for the city of Birmingham. Chief, T. C. McDonald, [and other officers]. The election of whom is hereby ratified and confirmed."

On April 1, 1893, the petitioner, T. C. McDonald, appeared before Mayor David J. Fox at his office, and offered to take the oath of office as required by section 48 of the city code, and to subscribe the same, and requested the said Fox, as such mayor, to administer the oath unto him; but the mayor refused to do so; whereupon the said McDonald filed the present petition praying for a writ of *mandamus*. In this petition the said petitioner averred the facts as above stated, and further averred that on March 31, 1893, he received from the board of commissioners of police a certificate of his election on March 6, 1893, as chief of police of Birmingham, and of the ratification and confirmation of his election on March 30, 1893, which certificate was signed by "J. P. Mudd, chairman," and "M. M. Boggan, sec-

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retary," who were members of said commission, and who had been previously elected to their respective offices. The respondent demurred to the petition upon many grounds, which may be summarized as follows: (1.) That the petition shows that the petitioner did not apply to take the oath within five days after his election. (2.) That it does not appear from the petition that the respondent Fox had any legal notice of the defendant's election. (3.) It was not shown by the petition that the petitioner was duly elected chief of police on March 6, or that his election was ratified on March 30, or that the police commissioners had any authority to ratify it. (4.) It is not shown in the petition that there was any vacancy in the office of chief of police at the time of the alleged election or ratification. (5.) That the petition seeks to compel the performance by *mandamus* of an act requiring the exercise of judgment and discretion. (6.) That the act establishing the board of commissioners of police, under which the petitioner claims to have been elected, was unconstitutional because, (a.) the whole purpose of the act was not expressed in its title; (b.) it was not competent to confer the power to appoint the board of police commissioners upon the probate judge; (c.) the act confers upon the probate judge the power to remove from office incumbents, whose terms had not expired, without due process of law; (d.) the act deprives the citizens of Birmingham of the right of local self-government. This demurrer was overruled by the court; and thereupon the respondent filed his answer, in which he renewed with more detail the several objections raised by the demurrer; and in addition thereto set up many facts to substantiate the following defenses: 1st. The denial of the election of the petitioner on March 6, 1893, and the ratification of his election on March 30, 1893. 2d. An attack upon the organization of the board of police commissioners. 3d. That McDonald had not executed bond, nor had the mayor and aldermen approved the same at the time of the demand and refusal averred in the petition. 4th. That the office was not vacant at the time of such demand, because S. H. Norton had, on December 9, 1892, been elected, under the then existing charter and ordinance, chief of police for the city of Birmingham for the year 1893. 5th. That the respondent was not legally and officially notified of the

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organization of the board of police commissioners, and of the appointment of said T. C. McDonald as chief of police.

It is not deemed necessary to set out in detail the many other facts which are shown by the bill of exceptions. Upon the hearing of the cause, the judge of the city court granted the relief prayed for in the petition, ordered the *mandamus* to be issued to the respondent, David J. Fox, Mayor of Birmingham, Alabama, commanding him to administer to the petitioner, upon application, the oath of office as chief of police of the city of Birmingham. From this judgment the respondent appeals, and assigns as error the overruling of his demurrer to the petition, and the rendition of the judgment awarding the writ of *mandamus*, together with many rulings of the court upon the evidence, which, as stated above, are unnecessary to be stated in detail.

GREGG & THORNTON, BROOKS & BROOKS and JAMES E. HAWKINS for appellant.—(1.) In the absence of constitutional authority, the legislature can not confer power to remove an officer, other than by act of the legislature abolishing the office, and this is especially the case when the office has a fixed tenure.—*Cotton v. Ellis*, 7 Jones (N. C.) 545; *Dullam v. Willson*, 53 Mich. 392, s. c. 51 Am. Rep. 128; *State v. Wiltz*, 11 La. Ann. 439; *State v. Harrison*, 3 Am. St. Rep. 663, s. c. 113 Ind. 234; *Hill v. State of Alabama*, 1 Ala. 563. (2.) The legislature of the State of Alabama had no constitutional authority to pass the act providing for the establishment of the Board of Commissioners of Police for the city of Birmingham, Ala., and vest in the judge of probate of Jefferson county the power to appoint the commissioners, and make no provision that the commissioners should reside in said city; the passage of the act being an unlawful attempt to deprive the people of the city of Birmingham of local self-government.—*Cooley's Cons. Lim.* (4 Ed.), 44; *State of Indiana, ex rel Jameson v. Denny*, 4 Lawyers' Rep. Ann. 79; *The People v. Hurlbut*, 24 Mich. 44; *People ex rel Bolton v. Albertson*, 55 N. Y. 50; *Park Commissioners v. Common Council of Detroit*, 28 Mich. 228. (3.) If the act under consideration gives to the commissioners the power to appoint the chief of police and other police officers, in place of the chief of police and other police officers duly

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elected by the board of mayor and aldermen of Birmingham before the approval of the said act of the legislature, it is unconstitutional, in that the subject of the act is not clearly expressed in the title.—*Ballentyne v. Wickersham*, 75 Ala. 533; *Brooks v. Hydorn*, 42 N.W. Rep. (Mich.) 1122. (4.) The act of the legislature, providing for the appointment of the Board of Police Commissioners, which elected appellee, is in violation of the constitution of Alabama, in that, it confers on the probate judge of Jefferson county, who belongs to the judicial department of the State, the power to appoint the police commissioners; the power to appoint to office being intrinsically an executive act, and properly belongs to the executive department of the State.—Code (1886) Alabama, p. 25, Cons. Art. III, §§ 1 and 2; Code (1886) Alabama, p. 35, Cons., Art. VI, § 1; Acts of Alabama 1892–3, p. 177; *Case of Supervisors of Elections*, 114 Mass. 247; *State ex rel Jameson v. Denny*, 4 Lawyers' Rep. Ann. 79; *Burgoyne v. Board of Supervisors of the County of San Francisco*, 5 Cal. 19; *Erlinc v. Smith*, 5 Cal. 112; *Dickey v. Hurlbutt*, 5 Cal. 343; *Toulune County v. Stanislaus County*, 6 Cal. 440; *Phelan v. San Francisco*, 6 Cal. 531; *People v. Hester*, 6 Cal. 679; *People v. Eldorado County*, 8 Cal. 58; *Sanderson's Case*, 30 Cal. 160; *Taylor v. Commonwealth*, 3 J. J. Marsh. (Ky.) 401; *State v. Kennon*, 7 Ohio St. 561; *Achley's Case*, 4 Abb. Pr. 35; *State v. Barbour*, 53 Conn. 76, 55 Am. Rep. 65; *Marbury v. Madison*, 1 Cranch. 137. (5.) The police commissioners appointed by the judge of probate, under said act of the legislature, and the chief of police of Birmingham elected by said police commissioners, are State officers, and not mere agents of a municipal corporation.—Code (1886) Alabama, Vol. II, p. 124, § 4260; Acts of Alabama, 1890–91, p. 127, § 19; *Burch v. Hardwicke*, 32 Am. Rep. (Va.) 640, and many other cases therein cited; *People v. Hurlbutt*, 24 Mich. 44, s. c. 9 Am. Rep. 103; *Cobb v. City of Portland*, 55 Me. 381; *Buttrick v. City of Lowell*, 1 Allen, 172; *Williams Case*, 44 Ala. 41. (6.) The act of the legislature providing for the establishment of a Board of Police Commissioners for the city of Birmingham, Ala., is expressly within the inhibition of the constitution of the State; but if the act is merely by implication within the inhibition of the constitution, it is the duty of the court to declare the law unconstitutional.—*Page v. Allen*,

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58 Pa. 338, 98 Am. Dec. 273; *People v. Gillson*, 109 N. Y. 389, 12 Cent. Rep. 616, 4 Am. St. Rep. 465; *Flint River Steam Boat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; *Baily v. Phil. W. & R. R. Co.*, 4 Harr. (Del.) 389, 44 Am. Dec. 593; *Boston v. Cummins*, 6 Ga. 102, 60 Am. Dec. 717; *State of Indiana ex rel. Jameson v. Denny*, 4 Lawyers Rep. Ann., page 93; *Ballentyne v. Wickersham*, 75 Ala. 533; *Lane v. Kolb*, 92 Ala. 636, 9 So. Rep. 873. (7.) Even if the act to establish a board of commissioners of police be constitutional, and McDonald be entitled to have the oath of office administered, he was bound to exhibit to the mayor *prima facie* evidence that he had a clear title thereto free from doubt, of which the mayor was to judge; and it being a judicial act the decision of the mayor is not reversible on *mandamus* even though his decision be wrong. But in this case the evidence of title exhibited by McDonald to the mayor did not show that he had a clear title thereto free from doubt, but the facts before the mayor clearly show that Norton, the present incumbent of the office, was duly elected to the office by proper authority, that his title thereto was free from all reasonable doubt, and that the decision of the mayor was clearly correct. Furthermore, the act of the legislature, properly construed, confers no authority upon the police commission to remove Norton from office during the existence of his term, without cause, and without a hearing.—*Ex parte Harris*, 52 Ala. 87; *Cook v. Candee*, *Ib.* 109; *Thompson v. Holt*, *Ib.* 491; *Ex parte Thompson*, *Ib.* 98; *Ex parte Jones*, 94 Ala. 33, 10 So. Rep. 429; *Ramagnano v. Crook*, 88 Ala. 450, 7 So. Rep. 247; *Dunbar v. Frazer*, 78 Ala. 538; *Mobile Ins. Co. v. Cleveland*, 76 Ala. 321; *Hodgkinson's Case*, 5 N. Y. (Hill) 631-634; 4 Amer. & Eng. Encyc. of Law, p. 99, note 2; *U. S. v. Seaman*, 17 How. (U. S.) 225; *U. S. v. Guthrie*, 17 *Ib.* 284; *State v. Governor*, 22 Wis. 110.

CABANISS & WEAKLEY, *contra*.—(1.) Administration of official oath is a ministerial act, and *mandamus* will lie to compel proper officer to administer it.—*In re Heath*, 3 Hill. (N. Y.) 42; *People v. Straight*, (N. Y. App.) 28 N. E. Rep. 762; *People v. Dean*, 3 Wend. 438; *People v. Olds*, 3 Cal. 167, see page 175; *People v. Fletcher*, 2 Scammon (Ill.) 483; *Ex parte Winfield*, 3 Ad. & Ell. 614; 30 Eng. C. L. 285; *Groome v. Gwin*, 43 Md. 572; 8 U. S. Dig. N. S. p. 525, Sec. 22. (2.) Laws and ordi-

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nances stipulating that oaths of office be taken or official bonds be executed within some specified time are directory merely, and hence the failure of McDonald to offer to take the oath within five days from March 6, 1893, the day of his election, did not destroy his right to have it administered to him on April 1st.—*Kearney v. Andrews*, 2 Stockton (N. J.) 70; *State v. Lindley*, 10 Ohio 51; *Lantz v. People*, 113 Ill. 137; 1 Dill. Munic. Corp. Sec. 214; *Sprowl v. Lawrence*, 33 Ala. 674; *State v. Churchhill*, 41 Mo. 41; *State v. County Court*, 44 Mo. 230; *People v. Hully*, 12 Wend. 481. But if this were not so, the ratification of the election on March 30th was equivalent to a new election and the offer on April 1st, within five days, was in time according to the strictest possible rule. (3.) Under our system, all officers are oath bound, and the petitioner was required under existing ordinances to take the oath of office. These ordinances applied to him.—*Joseph v. Cawthorn* 74 Ala. 411. (4.) The police commission act is constitutional, and is not subject to any of the objections made to its validity. (a) The title is sufficient.—*Board of Rev. v. Barber*, 53 Ala. 589; *Montgomery B. & L. Asso. v. Robinson*, 69 Ala. 413; *Dillard v. Webb*, 55 Ala. 468. (b) The legislature has plenary power over public officers and offices. Office holders have no vested rights in their places.—*Lane v. Kolb*, 92 Ala. 636, 9 So. Rep. 973, and authorities cited; *Lang v. Mayor*, 81 N. Y. 425; *People v. Whitlock*, 92 N. Y. 190; *Ex parte Lusk*, 82 Ala. 519, 526, 2 So. Rep. 140. (c) No clause of the constitution can be shown that guarantees to municipal corporations the right of local self-government.—*State v. Seary*, 35 N. W. Rep. (Neb.) 228; *State v. Bennett*, *Id.* 235; *Dillard v. Webb*, 55 Ala. 468; *Board of Rev. v. Barber*, 53 Ala. 589. (d) The legislature has all the legislative power of the British Parliament, except as limited by the constitution.—*Morgan v. State*, 76 Ala. 60; *Davis v. State*, 68 Ala. 58; *Hare v. Kennerly*, 83 Ala. 608, 3 So. Rep. 683; *M. & A. of Birmingham v. Klein*, 89 Ala. 461, 7 So. Rep. 386; *Dorman v. State*, 34 Ala. 231. (5.) The power to appoint to office is not declared in the constitution to properly belong to the executive department, it is not inherently and essentially an executive function, in the sense that it can only be constitutionally performed by a member of the executive department of the State. The probate judge is not by the constitution

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made a part of the judicial department; and it was competent for the legislature to empower the probate judge to appoint police commissioners for Birmingham.—*State v. George*, 29 Pac. Rep. (Ore.) 356; s. c. 16 Lawyers Rep. Ann. 737; *People v. Morgan*, 90 Ill. 562; *People v. Hoffman*, 116 Ill. 589; *Field v. People*, 2 Scammon (Ill.) 79; *McArthur v. Nelson*, 81 Ky. 67; *Baltimore v. State*, 15 Md. 376; s. c. 74 Am. Dec. 572; 34 Cal. 520; *People v. Freeman*, 80 Cal. 233; s. c. 22 Pac. Rep. 173; s. c. 13 Am. St. Rep. 122 and note; *State v. Seymour*, 35 N. J. L. 54; *Santa v. State*, 2 Iowa 165; *State v. Kolsen*, (Ind.) 29 N. E. Rep. 595; *Walter v. Cincinnati*, 21 Ohio St. 1 and 14; *State v. Harmon*, 31 *Ib.*, 250; 1 Dill. Munic. Corp. (4 Ed.), Sec. 60, p. 102; *Daley v. St. Paul*, 7 Minn. 396. (6.) In doubtful cases statutes will not be declared unconstitutional.—*Barb Wire Co. v. Brown*, 64 Iowa 275; *Baltimore v. State*, 74 Am. Dec. and note p. 595; *Louisville R. R. Co. v. Davidson*, 62 Am. Dec. 424. (7.) Contemporaneous construction of constitution and its sanction by subsequent legislative acts will be followed.—*Bruce v. Schuyler*, 46 Amer. Dec. 447; *Nichols v. Bridgeport*, 60 *Ib.* 636. (8.) It was the duty of the Mayor to obey the law, not to question its validity.—*State v. Shakespeare*, (La.) 6 So. Rep. 592; *People v. Salomon*, 54 Ill. 39; *Hoke v. Field*, 10 Bush. (Ky.) 144. (9.) The police commission act vested in the commissioners the power and imposed the duty of electing a chief of police for Birmingham, and when they elected petitioner the then incumbent's rights ended.—*Ex parte Wiley*, 54 Ala. 226; *Reynolds v. McAfee*, 44 Ala. 237; *Ex parte Lusk*, 82 Ala. 519, 2 So. Rep. 140; *Keenan v. Perry*, 24 Texas 253. (10.) The appointees of the mayor and aldermen held at the will of the board. When the power of that body was transferred to another body by the police commission act, their appointments terminated.—*Mechem on Agency*, § 270; *State v. Board*, 7 Neb. 42. (11.) This is not a petition to induct McDonald into office, but to require of defendant the performance of a ministerial duty attaching to his office. *Mandamus* is the appropriate remedy, and there is nothing in the incumbency of Norton, as shown in the record, to defeat petitioner in the remedy selected.—*State v. Ely*, 43 Ala. 568, 576; *State v. Plambeck*, (Neb.) 54 N. W. Rep. 667; *Beck v. Jackson*, 43 Mo. 117; *People v. Fletcher*, 2 Scammon (Ill.) 483; *Cope v.*

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State, 25 N. E. Rep. (Ind.) 866; *State v. Saron*, 6 So. Rep. (Fla.) 858; *Driscoll v. Jones*, 44 N. W. Rep. 726; *People v. Olds*, 3 Cal. 167, 175; *Ex parte Strong*, 24 Pick. 484; *State v. County Court*, 44 Mo. 230; High Ext. Leg. Rem. Sec. 52, p. 57; *Gulick v. New*, 77 Am. Dec. 49; *Delgado & Chavez* 34 Am. & Eng. Corp. Cases, 334; *The King v. Morgan Rice*, 5 Modern 325; *Ex parte Lusk*, 82 Ala. 519; 2 So. Rep. 140; *Lane v. Kolb*, 92 Ala. 636, 9 So. Rep. 873; *People v. Head*, 25 Ill. 325; *People v. Kilduff*, 16 Ill. 493; 75 Ill. 186. (12.) *Mandamus* will lie when relief can not be procured by *quo warranto*.—*Lewis v. Whittle*, (Va.) 5 Amer. & Eng. Corp. Cases, 271; *In re Strong*, 20 Pick. (Mass.) 495.

HEAD, J.—On December 12, 1892, the General Assembly passed “An act to establish a Board of Commissioners of Police for the City of Birmingham, Alabama;” which act provides for the appointment, by the probate judge in and for Jefferson county, of a board of commissioners of police for said city, consisting of five persons, and defines its powers and duties, among which are to appoint a chief of police and such other police officers and policemen as is or may be prescribed by city ordinance, and to exercise full direction and control of the officers and members of the police force in conformity to existing and future laws and ordinances on the subject. Accordingly, the probate judge appointed five persons who entered upon the duties of their offices, and, as a board, appointed T. C. McDonald to the office of Chief of Police, who thereafter presented himself to David J. Fox, the mayor of the city, for qualification, and demanded that the oath of office be administered to him; it being the duty of the mayor, under city ordinance, to administer the oaths of office to the officers of police. Fox declined to administer the oath, and McDonald applied to the city court of Birmingham for the writ of *mandamus* compelling him to do so. From an order of the court granting the peremptory writ, Fox appealed to this court.

This act is assailed by the appellant as unconstitutional, on several grounds. We will notice first, the chief contention, that it offends sections 1 and 2 of Article III of the constitution. These are as follows: “Article III. Distribution of Powers of Government. § 1. The pow-
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ers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another. § 2. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted." It is contended that the act in question is violative of these provisions for the reason, that the probate judge, upon whom the power of appointing the commissioners is conferred, is of the judicial department of the State government, while this power of appointment so conferred upon him properly belongs to the executive department, within the meaning of the constitutional provisions quoted.

To solve the question thus presented, we must learn what these provisions mean. Noticing them analytically, we observe, first, that the general purpose of the article is the distribution of the *powers of the government of the State*; and to that end, it is declared first, that those *powers* shall be divided into three distinct "*departments*"; secondly, that each of these "*departments*" shall be confided to a separate "*body of magistracy*," to-wit, those powers which are legislative, to one; those which are executive to another; and those which are judicial to another; and, thirdly, that no person, or collection of persons, being of one of those "*departments*" shall exercise any power properly belonging to either of the others, except in the instances expressly directed or permitted. Thus we see that the *powers* of government distributed are those which are divided into the three *departments*, and, by these three divisions or departments, confided to separate bodies of magistracy. First, then, what are we to understand by the terms "*departments*" and "*body of magistracy*," as they are here used? How are these bodies of magistracy to whom these powers are to be confided to be created and made known? Of whom or what shall they consist? We get definite and complete information upon this subject from the three succeeding articles of the constitution itself, viz.: "Article IV. LEGISLATIVE DEPARTMENT. § 1. The legislative power of this State shall be vested in a general assembly, which

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shall consist of a senate and house of representatives." "Article V. EXECUTIVE DEPARTMENT. § 1. The executive department shall consist of a governor, secretary of state, state treasurer, state auditor, attorney general and superintendent of education, and a sheriff for each county. § 2. The supreme executive power of this State shall be vested in a chief magistrate who shall be styled The Governor of the State of Alabama." "Article VI. JUDICIAL DEPARTMENT. § 1. The judicial power of the State shall be vested in the senate, sitting as a court of impeachment, a supreme court, circuit courts, courts of probate, such inferior courts of law and equity, to consist of not more than five members, as the general assembly may from time to time establish, and such persons as may be by law invested with powers of a judicial nature."

The term "departments," it will be observed, is first used to denote the three parts or divisions into which the powers of government are to be divided; but in the context it is used interchangeably with the term "body of magistracy," to denote the governing bodies to which the powers of government are respectively confided. Here then, we have a department or body of magistracy, consisting of a senate and house of representatives to which is confided the legislative power; a department or body of magistracy consisting of a governor, secretary of state, state treasurer, state auditor, attorney general and superintendent of education, and a sheriff for each county, to which is confided the executive power, the supreme executive power being vested in the governor; and a department, or body of magistracy, consisting of the senate, sitting as a court of impeachment, supreme court, circuit courts, courts of probate, such inferior courts of law and equity, to consist of not more than five members, as the general assembly may from time to time establish, and such persons as may be by law invested with powers of a judicial nature, to which is confided the judicial power, intended by the constitution to be distributed. When we speak, therefore, of the legislative department let us be understood to mean, as the constitution intends, the senate and house of representatives; of the executive department, the governor and other officers above named with him; and of the judicial department, the senate sitting as a court of impeachment, the

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courts and so forth, above named, as constituting that department. Keeping these definitions in view, we can the better determine the vital question arising upon the contention now under discussion in this cause, which is, what powers of government does the constitution intend shall be confided to the exercise, respectively, of these several governing bodies? Now, it must be conceded that the powers thus vested in these several departments are intended to be committed to their *exclusive* exercise; and this, independently of the provision that no person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others. Thus, for instance, the legislative power intended to be vested in the General Assembly can not be delegated to any other body, whether such body be of either the other defined departments or not, but must be exercised exclusively by the General Assembly itself. So also, an executive power intended to be vested in the executive department, can not, by legislation, be vested in any other person or body, whether such person or body be of either of the other departments or not. For instance, the pardoning power, or the power to fill vacancies in certain specified offices, being, by the constitution, vested in the Governor, can not, by legislation, be transferred to another, but must be exercised by the Governor exclusively. As this is so, in reference to acts expressly confided to a particular department, so also must it be true with reference to acts which, by construction or implication, are confided to that department. To repeat, all acts, expressly or impliedly, assigned to a department by the constitution must be performed by that department, and the power to perform them can not be conferred elsewhere. Cooley on Con. Lim., marg. p. 115.

We return then to the question: What powers does the constitution intend shall be thus confided to the exclusive exercise, respectively, of these several governing bodies? The insistence in argument of counsel for appellant, or that to which it leads, is, that, except in cases otherwise provided by the constitution itself, every act *which is legislative in its nature* and which pertains to, or in any wise affects, the government of the citizen, or which controls and regulates the conduct of citizens in their mutual intercourse, wheresoever, within the State, such govern-

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ment or control is to be accomplished, and for whatsoever purpose such accomplishment is intended, must be exercised by the state legislative department; that all acts which are of a *judicial nature*, affecting the government of the citizen, or pertaining to the enjoyment, enforcement or administration of the laws of the land, must be exercised by the state judicial department, or some member of it; and likewise, that all such acts which are of an *executive nature* must be exercised by the state executive department, or one of the designated officers composing it. The argument is that the *nature of the act* to be performed must, in every instance, determine the question; and that nature being found to be legislative, executive or judicial, the performance of the act must be assigned to the appropriate state department. We are quite clear the contention takes a step too far. / Now, it is certain that all powers which are, by the constitution itself, expressly or by necessary implication, referred to the exclusive exercise of these departments must be so exercised. There are many such provisions, but none of them provide for the appointment of officers of the kind here involved created by legislative enactment. All other powers, not expressly designated in the constitution itself, intended to be confided to the exclusive exercise of the departments thereby created, must be ascertained by construction. / It is a well settled principle that constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption; and we look at the antecedent government, consider its system, as a whole and in its several parts, and the experiences and practices of its administration; and we consider and weigh the evils of the old system which the people intended to cure by the new. Thus aided, we interpret those provisions which require construction, and determine what the intention of the framers of the instrument was, and give effect to that intention; and it not infrequently occurs, in the exposition of written laws, both constitutional and statutory, that the letter of a provision will be justly made to yield to a manifest intention in opposition to it, derived by construction alone. When we take our constitution, therefore, and read it in the light of this history, we see plainly that it was not intended to declare that every act pertaining to government and the regulation of the social

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and property rights of the citizen, should be exercised exclusively by the legislative, executive or judicial department of the state government, or some member of it, according as the act possessed a legislative, executive or judicial character; for we find there are many such acts especially peculiar to the very nature of our system, and necessarily inherent in it, which, time out of mind, have not been exclusively exercised by these departments, and which, for the ease and efficiency of our system, could not be so exercised. For illustration, confine literally all power of a legislative nature to the General Assembly, and we strike down, at once, all governments of towns and cities, by and through municipal corporations, whose very existence and efficiency depend upon the legislative, executive and judicial powers with which, by their nature, they must be clothed, and which they have ever, under the legislative authority of the State alone, been accustomed to exercise. In the light of long established usage and experience, we construe the constitution and determine that its framers never intended to interfere with the right of municipal corporations, under legislative sanction, to exercise these functions of government. It is true, that under the present constitution, it may be said that the right to create municipal governments with their usual powers, is recognized or provided for, but with the same provisions distributing the powers of government as those now in force, contained in the constitutions of 1819, 1861 and 1865, and with no mention in those instruments of authority in the General Assembly to create municipal corporations, the General Assembly, from 1819 to the present time, has exercised that authority, and the corporations so created have exercised the powers so conferred, without objection or suggestion from any source that such exercise was not within constitutional authority, on the assumption that all legislative, executive and judicial power was, by the constitution, confided to certain other designated bodies of magistracy. When we read upon this subject, we find the books teach us that the spirit of localized government, by local territorial sub-divisions, carried on through subordinate governmental agencies, found early root and growth in the notions of English liberty and polity; and we are told that from an immemorial or early period the local territorial sub-divisions

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of England, such as shires, towns and parishes, enjoyed a degree of freedom, and were permitted to assess upon themselves their local burdens and to manage their local affairs; and Judge Dillon declares that our ancestors, in the settlement of this country, brought these notions with them, and that they found here a field of unexampléd extent for their free development. Accordingly, he says, the system of intrusting the direction of local affairs to the local constituencies, had from the earliest colonial periods been carried on by us to a much greater extent than in England; and, he observes, as you pass from one end of this country to the other, alike in the oldest regions and in the newest organized settlements, you find the affairs of each road district, school district, township, county, town and city locally self-managed, including the administration of local justice. This policy of creating local police and municipal corporations, he declares, is exhibited in all our legislation, and expressly or impliedly guaranteed in our State constitutions. And Judge Cooley, speaking of the powers of legislation commonly bestowed upon municipal corporations, says, that such bestowal is not to be considered as trenching upon the maxim that legislative power must not be delegated, since that maxim is to be understood in the light of the immemorial practice of this country and of England, which has always recognized the propriety and policy of vesting in the municipal organizations certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority. Cooley on Con. Lim., marg. p. 118. The conventions which framed our several constitutions, therefore, had no need to expressly reserve to municipal corporations the legislative, executive and judicial power, so long wont to be exercised by them, when, in the distribution of the powers of the government of the State, they declared that the legislative, executive and judicial power should be confided to the respective departments or bodies of magistracy by them created and defined. The reservation arose by implication out of the existing order of things. Again: if all functions of government of a legislative, executive, or judicial character properly belong to, and are, therefore, to be exercised exclusively by, the several departments created by the constitution, what shall

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become of the multiform powers and duties, which by legislative enactment, without express constitutional authority, have so long been conferred upon, and exercised by, the various officers appointed to perform functions of government in the several counties, and who are not made members of either of those departments? Has it ever been thought that the executive and ministerial, and indeed, in some instances, the judicial, or *quasi* judicial functions of the tax assessor, tax collector, county treasurer, coroner, county surveyor and clerks of courts, to which may be added the officers and boards of control of our State institutions for the care of the insane and deaf, dumb and blind, and our State and county medical boards, for the preservation of the public health, properly belong to the several State bodies of magistracy created by the constitution, within the spirit and intent of that instrument, and must, therefore, be confided to the exclusive exercise of those bodies? None will so declare. Indeed, we have in our system, in opposition to the letter of the constitutional provisions under review, striking illustrations of the blending of legislative, executive and judicial power in the same persons or bodies, which it has not been, and will not be, supposed our several constitutions intended to inhibit. In Clay's Digest, and in each compilation of our laws since, we find the creation of a court of county commissioners. This body is an inferior court created by law, and belongs, under express provision of each of our constitutions, to the judicial department of government; yet, we find, in its very creation, it was, and has ever since been, endowed with legislative and executive powers. In fact, its chief duties are of those characters. It is given the power to levy and assess taxes for the support of the county government, which is a legislative function. Cooley on Con. Lim., marg. pp. 479, 488. It is given power to direct and control the property of the county; to examine and audit the accounts of the receiving and disbursing officers of the county; to make rules and regulations for the support of the poor; and it is given plenary and executive powers over the erection and maintenance of public roads, bridges and ferries and the appointment of the necessary officers in that behalf. These are functions which do not inherently pertain to the judiciary, yet none will say, in view of their long

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continued and useful exercise by the court of county commissioners, without let or hindrance, that the constitution, in distributing the powers of government, intended to inhibit such exercise. So, also, the sheriff who is expressly made a member of the executive department, has ever been empowered, by legislation, to perform the judicial function of approving bonds necessary to be taken by him in the administration of the laws. Clerks, registers in chancery, commercial notaries and commissioners of deeds, under constitutions in terms confining judicial power to the courts, have long exercised, under legislative sanction only, the power of taking acknowledgments of conveyances, which this court has declared to be of a judicial nature. The coroner is so far an executive officer that he may execute process upon, and arrest the sheriff himself, who is, by the terms of the constitution, a member of the state executive department, and yet it has never been supposed that he may not, with constitutional favor, perform the judicial function of holding inquests. Other illustrations might be given, but these suffice to make clear the principle that the constitution must receive an enlarged and liberal interpretation, and the intention of its framers ascertained upon a broad view of the history and experience, the needs and usages of the time, and the great general purpose they had in view of framing a comprehensive and beneficent government. Thus viewed, we irresistibly conclude that it was not the intention of the constitution to declare that all these powers and duties, so indispensable to efficient government, and so long exercised, under legislative sanction only, by these officers and agencies of legislative creation, properly belong to the legislative, executive or judicial body of magistracy created by the constitution, because alone they may partake of a legislative, executive or judicial nature.

We come then to the concrete question: Does the power to fill vacancies in office by appointment "*properly belong*" to the executive department of the State government, to be exercised exclusively by that department, within the meaning of the constitution? It may be regarded as a fundamental policy of our system of State governments in this country that the selection of persons to perform the offices and functions of government shall be left to the people themselves to be exercised at

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the ballot box. Indeed the right and attribute of the people in respect of the selection of their own officers, by methods which they may prescribe in their written constitutions and laws, are so firmly fixed in our institutions that the people themselves could not throw them off, to the extent of destroying our republican forms of government, for the people of the States have confided to the central government of the United States the power and duty to guarantee to every State in the union a government republican in form. Section 4, Art. IV, Cons. U. S. The inherent nature and essence of the act of selecting officers of government, therefore, in view of this established policy, describe it as one properly belonging to the people, through the ballot, and not to any particular department of government to be exercised by representatives of the people. The filling of vacancies in office pending the action of the people, by appointment of their representatives clothed by law with that authority, is, as a rule, an expedient merely, evoked by the convenience and necessities of government, growing out of the nature of our system. In the nature of things, the people can not be always called upon to act immediately when the selection of a person is necessary to the exercise of a function of government; hence, it has been customary and essential to provide other means of appointment in cases to which this necessity gives rise. Furthermore, in our experience, wisdom has dictated that particular offices be filled exclusively by appointment of some governmental agency other than the vote of the people themselves, and this, and the agencies for such appointments, and the methods of filling vacancies in offices elective by the people, have been expressly manifested and prescribed in our constitutions or laws. It was necessary that they be so prescribed, for otherwise the right of such appointment resided nowhere; it belonged to no department of the government. With us, the Governor has no prerogatives. He must find warrant in the written law for his every official act. He has no more power to appoint officers, when not expressly conferred, than has the president of the senate, who is of the legislative, or the chief justice of this court, who is of the judicial department; and when we go back to our constitution and laws in this State, from the beginning of the State government to the present,

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we find it has been the policy to distribute this appointing power among the several departments of the State. We need not specify. The instances will readily occur to the minds of those familiar with the constitutions and laws. It may be true, that the Governor has been invested with the greatest share of this power, but no principle or policy has been declared that the power inherently belongs to him. And we may remark that the fact that all our constitutions, in assigning appointive power to the Governor, have specifically designated the particular officers to whom it applied, furnishes cogent argument that the people did not regard the power as necessarily or inherently belonging to him.

In what we have said we have pretermitted inquiry whether or not the act of appointing an officer is inherently of an executive character ; and we have endeavored to show that whether so or not, it is not such an act as, upon a proper construction of the constitution, properly belongs to the executive department. The weight of authority joins issue upon the proposition that it is inherently of that character. The supreme court of California declares it possesses judicial characteristics. Says that court : "The person to be appointed is required to have certain qualifications. He must be a citizen of the United States and of the State, and a resident and qualified voter of the city and county, and he must be of good repute for honesty and sobriety, and he is required to produce evidence to this effect. * * * * The examination of these questions, passing upon the sufficiency of the evidence, and determining whether the candidates possess the requisite qualifications, are certainly functions partaking essentially of a judicial character."—*People v. Provinces*, 34 Cal. 520. In *People v. Morgan*, 90 Ill., on p. 562, it is said : "The executive power in a State is understood to be that power wherever lodged, which compels the laws to be enforced and obeyed. And the instrumentalities employed for that purpose are officers elected or appointed, who are charged with the enforcement of the laws. But the power to appoint is by no means an executive function unless made so by the organic law or legislative enactment." In *Mayor of Baltimore v. State*, 15 Md. 376, it is said : "We are not prepared to admit that the power of appointment to office is a function intrinsically executive, in the sense in which we under-

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stand the position to have been taken ; namely, that it is inherent in, and necessarily belongs to, the executive department. Under some forms of government, it may be so regarded, but the reason does not apply to our system of checks and balances in the distribution of powers where the people are the source and fountain of government, exerting their will after the manner, and by instrumentalities specially provided in the constitution."

In *People v. Freeman*, 80 Cal. 233, that court again held that the power of appointment to office is not essentially an executive function, and may be regulated by law. Judge Christiancy in *People v. Hurlbut*, 24 Mich. 44, had under consideration whether the legislature could appoint persons to fill offices created by it ; and his purpose was to determine whether such appointment could be treated as a legislative act which it was competent for the legislature to perform ; and in discussing the question he says : " Besides the power to make general rules for the government of officers and persons, and regulating the rights and classes of persons or of the whole community, there is a large class of powers recognized as legislative, occupying an intermediate space between those of a judicial character on the one side, and the executive on the other, and which are not, and can not be, marked off from these by any clear line ;" and further on he says : " As to this mode of appointment, being the exercise of a power essentially executive in its nature, it is sufficient to say that executive power can not always be defined by any fixed standard in the abstract. What would come within the executive power in our form of government, would fall within the legislative in another, and *vice versa*. The question here is whether, under our constitution, it is executive or legislative ; and as the constitution has not confided the appointment of those or of the like officers to the executive authorities, and has left it to the legislative discretion, whether to create such offices, and how they shall be filled, it can not be truly said that such an appointment is any more in the nature of the exercise of an executive than a legislative power." In harmony with these decisions see *State v. Constantine*, 42 Ohio St. 441 ; *People v. Woodruff*, 32 N. Y. 364. There are decisions to the contrary.—*Taylor v. Commonwealth*, 3 J. J. Marsh. 401 ; *State v. Kennon*, 7 Ohio St. 561 ; *Achley's Case*, 4 Abb. Pr. 35 ;

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State v. Noble, 118 Ind. 350, and other cases from that State. These Indiana cases give the question full discussion, and they appear to be the only well considered cases in support of their doctrine. Mr. Freeman, in an exhaustive note in 13 Amer. St. Rep., on p. 125, reviews all the authorities upon this subject, and states his conclusion from them in the following language: "The truth is, that the power of appointing or electing to office does not necessarily and ordinarily belong to either the legislative, the executive or the judicial department. It is commonly exercised by the people, but the legislature may, as the law making power, when not restrained by the constitution, provide for its exercise by either department of the government, or by any person or association of persons whom it may choose to designate for that purpose. It is an executive function when the law has committed it to the executive, a legislative function when the law has committed it to the legislative, and a judicial function, or at least a function of a judge, when the law has committed it to any member or members of the judiciary." What he has said meets with our approval.

It is again objected that the act is unconstitutional in that it denies to the city the right of local self-government. This contention is based on the power given the probate judge to appoint the commissioners, and upon the further assumption that the act empowers him to appoint persons who are not members of the municipality, who do not reside within the city. There is no force in the objection so far as concerns the designation of the probate judge as the appointing power. We have reached the conclusion that the probate judge may lawfully appoint the commissioners. With that act his duties end. He takes no part in administering the city government. The case is exactly the same as if the appointing power had been conferred upon the Governor, instead of the judge of probate, and we apprehend it would not be contended in that case, that the local government of the city was for that reason interfered with. The persons appointed commissioners exercise the functions of government conferred upon them by the act, and not the person who appoints them. But the other proposition may deserve more serious consideration. Upon mature reflection, we do not deem it necessary to decide what the effect upon the act would be, in respect of its constitution-

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ality, if the construction of the act thus assumed be the correct one; for, we reach the conclusion that it was not the intention of the legislature to authorize the appointment of persons who are not members of the municipal corporation for whose use the means of local government were, in part, being provided. The act is not carefully drawn. It is noticeable for the meagreness of its provisions, as well as the indefiniteness of some of those which are inserted. With this character, it is before us for construction. It is an act which relates alone to the local government of the city of Birmingham. Its controlling purpose, as all must know, was to provide an efficient enforcement of the police powers of the city. To this end, the legislature knew and intended that the commissioners to be appointed should be persons familiar with the governmental affairs of the city and the needs and wants of its police system, and who should be identified with the city's interest. The commissioners are required to exercise full direction and control of the officers and members of the police force. They are required to hold meetings at all times when the public interest of the city may require. They are required to exercise constant supervision of the conduct of the police officers and to prefer accusations against them for wrongs and delinquencies committed by them which would justify their suspension or removal. These duties, which manifest themselves as the moving causes of the enactment, unmistakably imply necessity for the appointment of persons resident in the city and interested in its welfare, and their constant presence therein, without which their duties could not be well performed. Suppose the probate judge had appointed residents of the county of Mobile, for instance, to manage the police affairs of the city of Birmingham, would any one suppose, or could it be legitimately contended, that the legislature intended by this act to confer any such authority? The answer would at once be, No! that the intention was that citizens of the municipality, to be affected by the legislation, be selected to perform these duties. Suppose, again, the legislature should create an office for the exercise of some State governmental function, and provide that the person to fill it should be appointed by the Governor, without providing that he should be a resident of the State, could it be contended that the Governor was em-

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powered to appoint a resident of another State? and would the act be declared unconstitutional upon the assumption that, for that reason, it infringed local self government? We apprehend it would be at once construed that the Governor must appoint a resident of this State. Legislative enactments are always presumed to be of constitutional authority. It must clearly appear that they offend some provision of the constitution before the courts are authorized to set them aside. If a construction may be fairly indulged which will wrest them from the attack of giving offense to a constitutional limitation, that presumption shall be indulged. We are, therefore, of the opinion that the failure of the act to provide in express terms that the commissioners shall be residents of the city is due to legislative oversight, which is supplied by the general intention of the legislature that they shall be such, manifest upon the face of the act itself.

It is again objected that the act is unconstitutional because, by its provisions, the terms of the present police officers are cut off, when that object is not expressed in the title. This contention may fairly raise the question whether, upon a proper construction of the act, the tenures of the present incumbents were cut off; but whether so or not, the parties have joined in a request that we construe the act and announce our opinion upon that question.

It is a principle self evident, as well as declared in all the authorities upon the subject, that legislative enactments, and each and every provision therein, go into immediate operation, unless by force of some general law, or provision contained in the act itself, the operation is postponed to some future period or event; and the special provision which would create such postponement must be stated in express words to that effect, or in terms so clear and certain as to admit of no other rational interpretation. The principle of this strictness results from the obvious necessity that all men should know with certainty when our laws take effect.—*Lane v. Kolb*, 92 Ala. 636, 9 So. Rep. 873, and cases cited. Applying this rule to the act in question, and it can not admit of doubt that the act went into effect at least as early as the day of the first regular meeting of the Mayor and Aldermen of Birmingham, in January, 1893—the time fixed in the act for

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the appointment of the commissioners. There are no provisions which show, with the degree of certainty the rule requires, an intention to further postpone its operation. This is true, not only with respect to the act as a whole, but to each and every provision thereof. The result is, that the power of the commissioners to appoint the police officers immediately arose, and all authority of the Mayor and Aldermen over their appointment and retention in office ceased. The persons in office being in by virtue of the appointive power of the Mayor and Aldermen, the abrogation or withdrawal of that power, and the substitution of a new appointive power in another body, necessarily, *ipso facto*, annulled the tenures of their appointees, there being nothing in the act retaining them in office.—*Lane v. Kolb*, *supra*; *State ex rel v. Board*, 7 Neb. 42. The rule is analogous to that which obtains in reference to agency. When the authority of an agent, who is empowered to appoint sub-agents, is revoked by the principal, the authority of all existing sub-agents, so appointed, is likewise revoked.—*Mechem on Agency*, § 270. These principles are so undeniable that it is unnecessary to do more than state them. The conclusion here reached does not determine that the act is unconstitutional upon the ground alleged that the purpose to accomplish such a result is not clearly expressed in its title. The title is, "An act to establish a board of commissioners of police for the city of Birmingham, Alabama." This implies the insertion in the act of all powers reasonably necessary to an efficient administration of the police department of the city by commissioners, which obviously includes power in the commissioners to appoint police officers. Such power, as we have already shown, has the effect, in itself, of cutting off the terms of incumbents. It follows, logically, from these unassailable propositions, that the title of the act was sufficiently comprehensive in the particular in question.—*Board of Revenue v. Barber*, 53 Ala. 589.

The next question arising is, What was the mayor's duty when McDonald presented himself for qualification? This record shows that it does not admit of serious question that the mayor had most ample notice and knowledge, official and personal, of McDonald's appointment. It was competent and necessary for the commissioners to organize for systematic work, by electing a presiding and

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a clerical officer. They did so by electing a chairman and secretary. The act says they must appoint a "clerk." This they did by appointing a person charged with the duties of a clerk. That they designated him by the synonymous title of secretary is wholly immaterial. The duties of the officer were the same, whether you call him clerk or secretary, and the nature of those duties is clearly implied in either designation. The law regards the substance, not the forms of things. The mayor of the city, as a principle of law, was bound to take official notice of the appointment of the commissioners, and of the necessary officers of their board by them elected. He knew, therefore, that Mudd was chairman and Boggan secretary or clerk. These officers duly certified to him McDonald's appointment. Besides, the proof is most abundant that the mayor personally knew all the facts, and made no pretense that he did not, but based his refusal to act either upon the assumed unconstitutionality of the act, or the mistaken conception that the tenures of those in office were not cut off. The trial of the title to the office was not within his jurisdiction. That must have been left to other tribunals. It was enough for him that McDonald presented a *prima facie* showing of his appointment emanating from the appointing power. This was done, and the oath of office should have been administered. There is clearly no merit in the suggestion that five days from McDonald's appointment had expired when he presented himself, for he had been re-appointed within the five days. It is said there was no re-appointment, but a *ratification* merely of the original appointment, which, upon the principles of the law of ratification, had relation to the time of the appointment ratified. This is a mistaken view. There is no such principle as the ratification by the appointing power of the prior appointment of a public officer. If a person has been informally appointed and has done official acts under it, or if he has acted without qualification, his acts are validated by law as those of an officer *de facto*, and no intent of *ratification* by the appointing power could add anything to their validity. So also, if a person duly appointed fails to qualify, within the time prescribed by law, and thereby forfeits his right, a vacancy arises which the appointing power may fill. His failure to qualify can not be "*ratified*." The appointing power can only fill the

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vacancy. Though the action of the commissioners, in the present instance, was put in the form of a ratification, its necessary legal effect was that of a reappointment. It was a clear act of the commissioners manifesting that thenceforth McDonald should be chief of police, and this was duly certified to the corporate authorities. Nothing more was necessary to constitute an appointment.

The act required to be performed by the mayor was purely ministerial. There was no other adequate remedy to secure the right than *mandamus*. The city court properly granted the writ, and its judgment is affirmed.

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Action on a Promissory Note.

1. *Acts and contracts of agent as binding corporation; ratification.*—In the ordinary dealings of construction and trading corporations, it is often impracticable for a company to speak and act through its governing body, and when acting through agents within the scope and purview of their chartered powers, the same intendments and implications arise, as spring out of similar actions or conduct of natural persons; and acts of a person assuming to represent such corporation, and transactions with him, in the line of the business of said corporation, even though without express authority, become binding on the corporation, if subsequently ratified by it, and such ratification may be made expressly or by mere acquiescence, or by a failure to repudiate the act, knowing it to have been done.

2. *Unauthorized transfer of notes by officer of a corporation; ratification thereof.*—A corporation was formed for the purpose of building a railroad, and became indebted to a bank for money borrowed to carry on its work. The corporation was forced to borrow money almost from the day of its organization, and in every instance was compelled to give collateral security; the board of directors had, in many instances, authorized the transfer of collaterals by the president for the purpose of borrowing money; and had even authorized the mortgaging of its lands by its president for that purpose; the books of the corporation were kept open at their principal office, and all transactions were entered upon them; and the directors knew of the large indebtedness of the said corporation to the bank. Without express authority from the directors, or the stockholders, the president, as the active finan-

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cial agent of the said corporation, transferred to said bank, as collateral security for said indebtedness, a note of subscription to the capital stock of the railroad company, which had been transferred to the said construction company. Subsequent to this transfer, six of the nine directors of said corporation separately signed, but not at a meeting of the directory, a paper ratifying this transfer by the president to the bank of the said note as collateral security. *Held*, that said transfer was ratified by the corporation, and was binding.

3. *Action on a note; proper parties plaintiff.*—In an action on a promissory note, when the plaintiffs are the parties to whom payment may be legally made, and who can legally discharge the debtor or maker, suit is properly brought in their names, although the money when collected may not be for their use alone, but for the use of themselves and others, to whose use they are legally required to apply it.

4. *Formation of a corporation under the general law; legal existence can not be assailed collaterally.*—For the formation of a corporation under the general law, a substantial compliance with all the terms of the general corporation law, having reference to the character of the corporation to be formed, is a prerequisite to its organization; but when an association of persons is found in the exercise and user of corporate franchises, under color of legal organization, their existence as a corporation can not be inquired into collaterally. The corporation exists *de facto*, and is subject to all the liabilities, duties and responsibilities of a corporation *de jure*.

5. *Estoppel by contract with a corporation.*—One who contracts with a corporation having a *de facto* existence, and the reputation of a legal corporation, in the actual exercise of corporate powers and franchises, is estopped from denying the legality of the existence of the corporation, or inquiring into the irregularities attending its formation to defeat a contract, or to avoid the liability he voluntarily and deliberately incurred; and especially is this true as to stockholders seeking to avoid a liability to creditors of a corporation.

6. *Stockholders of a corporation; fraud as a defense to action on note for subscription.*—Where one has been induced by fraud to become a stockholder in a corporation, he may set up this fraud as a defense to an action on his note, given for the payment of the amount of his subscription.

7. *Subscription to stock; fraud therein; evidence.*—Where, in an action by the transferees of a note, given by a subscriber to the capital stock of a railroad corporation, for the amount of his subscription, the maker of the note, by special plea interposes a defense of fraud in procuring his subscription, and the failure and want of consideration for the note, it is shown by the evidence that the only condition attached to the subscription was that the railroad was to be finished between certain terminal points within a certain time, and that it was to issue to each subscriber two thirds of the amount subscribed for of its own capital stock, and one third of the amount in the capital stock of a corporation formed to build said railroad; that the note subse-

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quently executed for the amount of the subscription contained conditions relating only to the time and manner of the completion of the road, and made no reference to stock in the company formed to build said railroad; that on the day of the execution of the note the maker accepted from the said construction company its obligation to exchange one third of its stock for a like proportion of the amount of his subscription in the railroad company, when the note sued on was paid; that at the time of the execution of the note, and the last mentioned agreement, both corporations had received their certificate of incorporation, and had performed all preliminary acts entitling them to such certificate, except the payment of 20 per cent of the capital stock; and that the maker of the note himself testified that no representations were made to him that such 20 per cent had been paid, and he did not inquire or investigate the matter, the fraud attempted to be set up as a defense is not sustained, and there is shown no failure or want of consideration for the note sued on.

8. *Repeal of general corporation laws; effect as to corporations formed thereunder.*—The repeal of a general corporation law can not be construed, in the absence of express provisions, as intended to repeal the charters of corporations formed under such law previous to its repeal, when the manifest purpose of the repealing act is to substitute a new law, extending the provisions of the old, supplying omissions, and perfecting its details, without changing its general policy, or interfering with corporations formed under it.

APPEAL from the City Court of Montgomery.

Tried before the Hon. JOHN M. CHILTON, Special Judge.

This action was brought by J. L. Hall and L. B. Farley, as trustees, against the appellant, W. C. Bibb, Jr., and counted on a promissory note, given by the defendant to the Alabama Midland Railway Company, for the amount of his subscription to the capital stock of said company. This note was subsequently, together with other collaterals, transferred to the Alabama Terminal & Improvement Company, which latter company transferred the same to the Farley National Bank, and while in the possession of said bank they were transferred to the plaintiffs. The cause was tried by the judge without the intervention of a jury, who, at the request of the parties, rendered a special finding. The facts set out in this special finding are sufficiently stated in the opinion. There was judgment for the plaintiffs, and the defendant appeals, and assigns as error the rendition of said judgment.

BRICKELL, SEMPLE & GUNTER, for appellants.—(1.)

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The only title to the note sued on is derived from the written transfer made by the president and treasurer, who have no authority *virtute officii*, or by any shown delegation of power, to dispose of the property of the corporation; and the pleadings of the case put the burden on the plaintiffs to show the transfer of the beneficial interest by the corporation, or a lawfully constituted agent.—Code, § 2770; Cook on Stock & Stockholders, § 716; *Spyker v. Spencer*, 8 Ala. 333; *Gibson v. Goldthwaite*, 7 Ala. 292–3; *Duke v. Markham*, 10 So. East. Rep. 1017. (2.) The Alabama Terminal & Improvement Company was never more than a *de facto* corporation. The preliminaries to a legal organization as a corporation were never complied with; there was a positive combination and agreement that the 20 *per cent.* of the subscription required to be paid in cash, should not be paid.—Code of 1876, § 1807; Acts of 1882–83 p. 40; 1 Spelling on Corporations, §§ 35 note 1, 37, 38. (3.) The corporation being *de facto* only, the law of its existence and the rule of its conduct is necessarily that which is applicable to persons, and to corporations of its kind, at the date of the several acts called in question; and thus, when the Code of 1876 was superseded by that of 1886, the latter would become the rule of conduct alike for corporations and natural persons. (4.) But if this be not so, and it be held that there was a *de jure* organization under the Code of 1876, still the law of 1876, under which the company existed, was expressly repealed by section 10 of the Code of 1886. One of two alternatives result from this repeal. The company was either dissolved by the repeal of its charter, or it exists under, and by virtue of, and subject to, the terms of the new law. The latter may result from a continuance unlawfully, but as a *de facto* body, after the repeal of the charter, or from a continuance under the new law, taking it as an amendment merely of the old law.—*Wilson v. Tesson*, 12 Ind. 285; *Wright v. Oakley*, 5 Metc. (Mass.) 406; *Greenwood v. Freight Co.*, 105 U. S. 12; 71 Miss. 527. (5.) No corporation can exist *de jure* in this country without a living, subsisting statute to “feed its vitality”, and it is just as certain that the unconditional repeal of a general statute “feeding the vitality” of a number of corporations, dissolves all of them, as the repeal of a special law supporting a single corporation destroys it.

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There is an absolute repeal in the latter part of section 10 of the Code of 1886. But there are two conditions to be considered. The first part of the section says, it shall not interfere with existing "rights and remedies" &c. The counsel for the plaintiffs can not take shelter under these words, and insist that their corporation had a vested "right in a rule of law." This position is sufficiently answered in authority, by Taylor on Corporations, § 497, and in reason, by contemplating the consequences of such rule. It is plain that there is no shelter under this condition. The other is, that repeals of laws and re-enactments at the same instant of the same laws modified, are regarded as mere amendments and revisions, and repeal only to the extent of repugnancy. Indeed, section 10 of the Code of 1886 only undertakes to repeal general laws not included in the Code.—Endlich on Statutes, § 201; *Fairchild v. Masonic Hall Asso.*, 71 Mo. 527; *Rhodes v. Hoernerstown B. & S. Asso.*, 82 Penn. St. Rep. 180; *Green's Brice's Ultra V.* 98 n.; *Tomlinson v. Jessup*, 15 Wall. 458-9; *Holyoke Co. v. Lyman*, *Ib.* 500; *Greenwood v. Freight Co.*, 105 U. S. 13; *Wright v. Oakley*, 5 Metc. (Mass.) 400-6; *Close v. Glenwood*, 107 U. S. 76; *Oregon Ry. Co. v. Oregonian Ry. Co.*, 130 U. S. 26; 1 Beach on Corp., §§ 37-8; *State v. Miller*, 86 Am. Dec. 88 n.; *State v. Mayor &c. of Jersey City*, *Ib.* 240; *Middleton v. New Jersey Coast Line R. R. Co.*, 11 C. E. Green 269; *United Hebrew Asso. v. Benshimol*, 130 Mass. 327; *Town of St. Albans v. National Car Co.*, 11 A. & E. Corp. Cases, 651; *Steamship Co. v. Joliffe*, 2 Wall. 459; *The State Bank of Indiana v. The State of Indiana*, 1 Blackf. 267; *Wilson v. Tesson*, 12 Ind. 285; *Sutherland on Stat. Con.*, § 134; *Dwarris on Stat.*, 676; *St. Peter's R. C. v. Germain*, 104 Ill. 440. (6.) The position that although there was no authority in the president to make the pledge to the bank, the transaction was confirmed and ratified, can not be sustained. The board of directors of a corporation can not act so as to bind the corporation except in meeting assembled.—*Peters v. Lincoln &c.*, 2 McCrary, 275; *Alta Silver M. Co. v. Alta P. M. Co.*, 21 Pac. Rep. 373; *Gashiler v. Willis*, 91 Am. Dec. 667; *Baldwin v. Campfield*, 26 Minn. 55; 1 Spelling on Corp., § 424; 1 Morawetz, § 511; *Duke v. Markham*, 10 So. East. Rep. 1017. (7.) The pleas of the defendant that he was induced by fraud to subscribe for the stock, and that there was a failure or

want of consideration for the note, are sustained by the special finding. The corporation was never in a condition to give to the maker that for which he subscribed—stock of a corporation duly and legally organized. A party who deals with a corporation and receives a consideration and tries to avoid his obligation on the immaterial point to him, that the company is improperly organized and subject to a *quo warranto*, is not allowed the plea. But when the very thing to be given for this promise is valid and legal stock, which is represented can be given, and it is well known to the promiser that it can not be done, and the circumstances which might disclose the fraud are concealed to effect the deception, there is no reason of law which forbids relief to the victim of fraud.—*Snider v. Troy*, 91 Ala. 224; *Winter v. Armstrong*, 37 Fed. Rep. 512; *Bard v. Banigan*, 26 Am. & E. Corp. Cases 155; *American Tube Works v. Boston M. Co.*, 139 Mass. 5; *Reed v. Boston M. Co.*, 141 Mass. 454; 2 *Spelling on Corp.*, §§ 573–8. (8.) A subscriber for the capital stock, the maker of the note, can not be compelled to take stock in a corporation which has not been legally organized, and the stock of which will be worthless. He is not estopped from showing these facts. He was never a stockholder. He merely proposed to become one in a legal corporation. His offer was made on the implied condition that valid stock would and could be issued.—*Peck v. Gurney*, Law Rep. 13 Eq. Cases 79; *Winter v. Armstrong*, 37 Fed. Rep. 512; *Toledo v. Hinsdale*, 15 N. E. Rep. 671; *Reed v. Boston M. Co.*, 5 N. E. Rep. 852; *Tube Works v. Machine Co.*, 139 Mass. 5.

TOMPKINS & TROY, *contra*.—(1.) The only question raised by the present record is, whether, upon the facts disclosed in the special finding of the trial court, the city court properly rendered judgment for the appellees.—Code of 1886, § 2745; *Betoncourt v. Eberlin*, 71 Ala. 461. (2.) The plaintiffs in the court below were shown to have such interest in the note sued on, as entitled them to maintain the present action. The law never intended to prevent parties from investing in the trustee or trustees notes in which a number of persons have a separate and distinct interest, with authority to collect and receipt for the same; and when this is done such parties are clearly authorized to maintain suits in their

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own names upon such notes.—Code of 1886, §§ 1784, 1832; *Yerby v. Sexton*, 48 Ala. 311; 18 Amer. & Eng. Encyc. of Law, 661; 19 Amer. & Eng. Encyc. of Law, 552-3 n. (3.) What law governs as to the authority of the Ala. Terminal & Improvement Co.? That company was organized under the law contained in the Code of 1876 as amended.—Code of 1876, §§ 1803, 1812; Acts of 1882-3, p. 5. (4.) That law was its charter, and its rights and powers, including the mode of conducting its business, under it were the same as they would have been had a special charter been granted to it by an act setting out the same terms and provisions contained in that general law.—1 Morawetz on Corp., § 318. (5.) The power to pledge property is a power incident to all business corporations.—*Lehman v. Tallassee Mfg. Co.*, 64 Ala. 567; 1 Morawetz on Corp., § 349. (6.) The power to make this pledge is vested in the officers of the corporation or in its governing body, not in the shareholders, unless there is a statute vesting it in the latter.—1 Morawetz on Corp., § 510. (7.) The only limitation upon these general powers of directors contained in the law under which this company was formed was a prohibition against the bonded indebtedness being increased, and the execution of a mortgage except by consent of the stockholders. Pledge and mortgage are words of very different import and meaning, and the contracts by which they are created also materially differ.—18 Amer. & Eng. Encyc. of Law, 588-92. (8.) The contract in question created neither a strict pledge nor mortgage, but was really a deposit of the note as collateral security. The power to sell the security in payment of the debt was not given by the contract and does not exist at law. The only power in the creditors is to collect and apply the proceeds to the payment of the debt.—18 Amer. & Eng. Encyc. of Law, *supra*; Jones on Pledges, §§ 1, 651. (9.) It has been held by the highest court in the land that the power to borrow money vested in an officer of the corporation would vest in him the power to make deposit of collateral security, while it would not authorize him to make a chattel mortgage.—*Hatch v. Coddington*, 95 U. S. 48; Jones on Corporate Bonds, § 46. (10.) Then the A. T. & I. Co. could make a deposit of the notes in controversy as collateral security, without the consent of its stockholders, if the law under which it was incor-

porated was its charter. Conceding the right to amend or repeal that charter, we say neither has been done. This charter was an existing right at the time of the adoption of the Code of 1886, and was preserved by it.—Code of 1886, § 10. (11.) Rights and powers of a corporation are usually to be determined by the law in force when it came into being.—*Chesapeake & Ohio R. R. Co. v. Miller*, 114 U. S. 176. (12.) And the repeal of a general law, under which a corporation has been formed, does not repeal its charter, nor in any manner affect the corporation.—2 Morawetz on Corp., § 1110; *United &c. Asso. v. Benshimol*, 130 Mass. 325; *Freehold M. I. Asso. v. Brown*, 29 N. J. Eq. 121; *Donworth v. Coalbaugh*, 5 Clark (Iowa) 300; 2 Spelling on Corp., § 1066. (13.) The rule is, that no later legislation will be held to either repeal or amend a charter, unless it does so expressly or by necessary implication.—*Freehold &c. Asso. v. Brown*, 29 N. J. Eq. 122; *Banger &c. R. Co. v. Smith*, 47 Me. 34; *Webb v. Ridgeley*, 38 Md. 364. (14.) Title 1, Part 2 of the Code of 1886 is not a codification of the former provisions of the law relative to the formation of corporations, but the substitution of a new system. It is expressly declared in many places that particular provisions of the new law apply to corporations organized under former laws.—Code of 1886, §§ 1528, 1535, 1538–9, 1586–7, 1594–5. It then being shown that the legislature had expressly declared in some sections that the new law shall apply to the old corporations, and has in others omitted all such declaration, it must be presumed that it was not intended that the latter should apply to such companies.—*Lehman v. Robinson*, 59 Ala. 219. (15.) The directors having the power to make the pledge, if it was made without their authority they could ratify it. Such ratification may be either by acquiescence, or by the failure to disaffirm, when notice was brought to them that the act had been done. The directors can ratify what they could have authorized.—1 Beach on Corp., § 195; 2 Morawetz on Corp., §§ 618, 627, 633–5; 90 N. Y. 607; 8 Amer. & Eng. Corp. Cases, p. 144; 9 Amer. & Eng. Corp. Cases, 508; 6 Amer. & Eng. Cor. Cases, 380; 120 U. S. 256; 70 Mo. 324. (16.) The defendant can not set up as a defense to the present action the illegality in the formation of the corporations. The illegality or irregularity of a corporation can not be

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attacked collaterally.—2 Morawetz on Corp., § 769; *Kayser v. Bremen*, 16 Md. 90; *Lehman v. Warner*, 61 Ala. 455; *Cen. Ag. Asso. v. Insurance Co.*, 70 Ala. 120. (17.) The payment of the money was not a condition precedent to the legal existence of the corporation; at most it was but a prerequisite to its right to do business. The corporation came into existence when it organized by electing a board of directors and officers.—Code of 1876, § 1806; *Sparks v. Woodstock &c.*, 87 Ala. 294; 6 So. Rep. 195; 1 Morawetz on Corp., §§ 71-2; 2 Morawetz on Corp., § 742, (1st. Ed.); 1 Spelling on Corp., § 1; Cook on Stocks and Stockholders, § 172; *Pike Road v. Smith*, 30 Ala. 665; *Selma R. v. Rountree*, 7 Ala. 670; *Mitchell v. Rome R. R. Co.*, 16 Ga. 588; *Harod v. Haymes*, 32 Wis. 162; 101 Mass. 381-385. (18.) Having contracted with the Alabama Terminal & Improvement Co., the defendant in the present action is estopped from denying its existence as a corporation, since the rights of creditors have intervened.—Cook on Stocks and Stockholders, §§ 184-5; *Snider's Sons & Co. v. Troy*, 91 Ala. 224; 8 So. Rep. 658; 1 Spelling on Corp., § 43; *Lehman, Durr & Co. v. Warner*, 61 Ala. 455; *Central Asso. v. Ala. Ins. Co.*, 70 Ala. 120.

HARALSON, J.—I. If there is a special finding of facts in the lower court, as was the case here, at the request of one of the parties, the Supreme Court must, on appeal, examine and determine whether the facts are sufficient to support the judgment.—Code, § 2743. It must find directly and affirmatively every issue in fact essential to the right of recovery, or judgment on it can not be pronounced, and it can not be aided by intendment or by reference to extrinsic facts.—*Betancourt v. Eberlin*, 71 Ala. 461; *Quillman v. Gurley*, 85 Ala. 594, 5 So. Rep. 345.

II. Then, what are the issues of fact in this case, essential to recovery?

The note sued on was dated July 21, 1887, and reads: "I promise to pay to the Alabama Midland Railway Company, as now chartered under the general railroad laws of the State of Alabama, or any amendments that may hereafter be made either by general law or by act of the legislature, its order or assigns, five hundred dollars, at the banking house of the First National Bank of

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Montgomery, Alabama, to be paid in cash on demand, at the maturity of the note; this amount being the total of my subscription to the capital stock of the Alabama Midland Railway Company. It is agreed, that said amount, to-wit, \$500, matures and becomes due and payable, whenever the board of directors of said company shall decide that the Alabama Midland railroad has been finished to a point within a mile from the centre of the city of Montgomery, from one or the other of its terminal points, and that said road is of standard guage, laid with steel rail. Publication of said decision of said board of directors to be made in one of the daily papers of the city of Montgomery, Alabama, shall be final and conclusive notice to me of the same. It is hereby agreed and made part of this contract, that if the said Alabama Midland Railway Company should fail to complete the work, necessary to make this obligation binding, by the first day of October, 1890, then this instrument is null and void."

The finding shows, that "On the 7th day of May, 1887, the defendant subscribed \$500 to the capital stock of the Alabama Midland Railway Company. The conditions attached to the subscription were, that the amount was to be paid when the railroad 'is built, furnished and equipped to this city, (Montgomery), from either one or the other of its terminal points, and a line is perfected to Jacksonville and Savannah, Ga. Upon the payment of the sum above stated, the Alabama Midland Railway Company shall issue to each subscriber two-thirds of the amount subscribed for of its own capital stock and one-third of the amount in the capital stock of the Alabama Terminal & Improvement Company, which last company is formed to build said railroad.'"

The finding states the fact, that the board of directors of each of said corporations had decided and advertised the facts in all respects as required by the conditions of said subscription and said note,—that said railroad had been built and equipped in the manner and within the time prescribed in said subscription and note.

III. The defendant's pleas were, in substance, that the plaintiffs are not the parties interested in the instrument sued on; that the note is not the property of the plaintiffs, but that it is the property of the Alabama Terminal & Improvement Company, a corporation under the

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laws of Alabama; want and failure of consideration of the instrument sued on; that both companies were fraudulently organized, by means of false certificates of organization, and that this was concealed from defendant and he was deceived and intentionally defrauded into making the contract to subscribe for the stock. The errors assigned are, that the facts found by the special judge sustain these pleas, and do not sustain the judgment rendered.

We have referred above, to the finding of the special judge as to the compliance by the corporations with the conditions of the subscription and note, touching the manner and time of the completion of the railroad. No point is made in the argument of counsel on the sufficiency of the findings to sustain the judgment, on this branch of the case.

IV. Let us refer, in the first place, to the ownership of the note sued on by the plaintiffs. As touching the same, the special finding ascertained, that the general purpose of the Alabama Terminal & Improvement Company,—as shown by its declaration for incorporation,—was to build and equip railroads and railways, under contract for and with other parties; that the Alabama Midland Railway Company received from numerous persons, including the defendant, their notes for subscription to its capital stock, and that these notes, afterwards, became the property of the Alabama Terminal & Improvement Company; that the Farley National Bank, a corporation organized under the national banking laws, and located at Montgomery, Alabama, opened an account with the Alabama Terminal & Improvement Company, at the request of the company, by J. W. Woolfolk; that in the course of the dealings between the bank and the company, the latter became indebted to the bank, on account of money advanced to it, in the sum of about \$150,000; that this indebtedness arose by the discount by the bank of the notes and drafts executed in the name of the company by its president, Woolfolk; that the proceeds of such notes and drafts were placed by the bank on its books to the credit of the company, and was checked against by said Woolfolk, as president; that some of the money checked out was applied by Woolfolk to the payment of obligations of the Alabama Terminal & Improvement Company, and some was applied by

him to the expense of constructing the Montgomery, Tuscaloosa & Memphis Railway; that the Alabama Terminal & Improvement Company paid back to the bank, about \$18,000, leaving a balance due of about \$130,000, which has never been paid; that J. W. Woolfolk, as president, on the — day of July, 1892, executed to the Farley National Bank an instrument in writing, transferring to said bank, as collateral security for a large sum then due, (and which sum has not been paid), a large number of the notes of subscription to its capital stock, and to the capital stock of the said Alabama Midland Railway Company, then owned by the Ala. Ter. & Imp. Co., including the note of defendant; that the said transfer was made subject to the rights of the Metropolitan Trust Company of New York, which then held said notes for the purposes of security under a contract with the Ala. Ter. & Imp. Co.; that in August, 1891, the Farley Nat. Bank failed, and was placed in the hands of a receiver by the Comptroller of the Currency; that while suspended, to-wit, in February, 1892, said Trust Company turned said notes over to L. B. Farley for said receiver.—its claim to said securities being released; that subsequently, the capital of the bank was made good, the receiver withdrawn, and the bank was authorized, under the national banking acts to resume business; that on the 23d of February, 1892, the board of directors of the Farley National Bank, (which had then resumed business), passed resolutions authorizing the transfer of said notes and securities to J. L. Hall and L. B. Farley, as trustees, and the same were so transferred, the same day, by H. D. Herron, the agent of the bank, thereto authorized, amounting to about \$333,000; that all the indebtedness of the A. T. & I. Co., for the security of which the said transfer of said securities as collateral was made, (subject to certain credits), was transferred with the collaterals to the plaintiffs; but the sum of \$30,000 of the original indebtedness (credited thereon as hereafter shown) was retained, and is still held by the Farley National Bank, while all the securities were transferred to the plaintiffs, to collect and apply to the payment of the whole indebtedness, including that portion retained by the Farley Nat. Bank, as shown by the transfer by said bank to the plaintiffs. The written transfer, attached as a part of the finding, recites, that suit has

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been brought by the bank against the Ala. Ter. & Imp. Co., upon said notes and other evidences of debt, which suit is now pending; and since said suit has been brought, the said company has paid the bank, \$10,000 in cash, and has executed its three bills for the sum of \$10,000 each, bearing date—February, 1892, and payable sixty days, ninety days and four months after date, respectively, which sum, amounting to \$40,000, together with \$3,700.14, to which the company was entitled to as a credit, being applied as credits to the ascertained balance due by said company to the bank. viz., \$151,008.99, left a balance of \$107,308.85, due by said company to the bank, which balance, together with all of said notes and securities, the board of directors of the bank transferred, assigned and set over to the plaintiffs, as trustees, for the purposes specified in the resolutions of transfer, and authorized and empowered Henry D. Herron, for and in the name of the bank, to execute a written instrument, necessary and proper for the purpose of transferring the said indebtedness and the said collaterals to secure the same, to the plaintiffs, which he did. The amount of the indebtedness did not include the \$30,000, for which the company gave its notes to the bank, as above stated. No objection is made in the assignments of error, or in the argument of the counsel, to the correctness and sufficiency of these resolutions, and the transfer by Herron under them, to accomplish the purposes designed, if Woolfolk, as president, had the right to transfer said collaterals to the bank. The substance of this transfer has been given above, in the findings of the special judge. It is signed by J. W. Woolfolk, Pres't., and purports to be made in behalf of the said A. T. & I. Co.

The judge finds, in respect to the authority of Woolfolk to make this transfer, from an examination of the minute books of the A. T. & I. Co., and from the evidence, that the president was not authorized by the stockholders to make said pledge, nor was it ever ratified by the stockholders; that his act was never expressly authorized by the directors, nor was it ever expressly confirmed by them, at a meeting of the directors. But, as he stated, he reached the conclusion of fact from the evidence, that if the president did not have the express power, under the charter and by-laws of the company, yet the directors, with knowledge of the facts, so ac-

quiesced in his act, in pledging the securities, that the corporation is now bound by his acts.

He bases this finding on the following facts: (a.) The Alabama Terminal & Improvement Company was compelled to borrow money almost from the date of its organization, and, in every instance disclosed by the evidence, was compelled to give security either personal or by depositing collaterals, and it took all they could do to persuade the people to lend it to them; that papers were constantly coming to the bank and there was no money to meet them, and they had to call meetings of the people interested, and persuade them to make papers to raise money and meet such maturing obligations to keep the company from going to protest; that, sometimes, such papers were signed, both, by the A. T. & I. Co. and the Alabama Midland Railway Company, but generally, by the former, and the debts were very large. (b.) At a meeting of the directors on August 8, 1891, the president was authorized to borrow money by a mortgage on certain lands of the company, the resolution reciting that it was desirable to use the lands as collateral for the purpose of raising money. At that meeting, the president mentioned to the board the fact of the company's indebtedness to the bank; that under that resolution, the president executed mortgages to the bank on lands in Montgomery and elsewhere. Dr. Tennell, one of the directors of the A. T. & I. Co., testified to the fact of the failure of the bank, and that it resulted from the large indebtedness of the company to it, which fact was published in the papers and was generally known and talked about in Montgomery and Troy, but he did not know the facts before. (c.) No other director except Dr. Tennell was examined as a witness. (d.) A considerable portion of the money borrowed went to pay debts of the A. T. & I. Co. (e.) The books of the company were kept at Montgomery, Ala. A check book was kept, and showed on what account checks were drawn on the bank, and all transactions were posted on the books of the company, kept at the Montgomery office. On the 25th of January 1892, six of the nine directors of the A. T. & I. Co., signed a paper in which they ratified and confirmed the transfer by the president of these collaterals to the bank, which paper was signed, separately, by the directors, and not at a meeting of them. The

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minutes of the several meetings of the directors were introduced in evidence, showing that, in all the instances there disclosed, in which collaterals had been deposited, the president was expressly authorized to deposit them.

The defendants insist, that, on the foregoing finding, it appears that the plaintiffs are not the owners of the note sued on, that it is not their property, but belongs to the Ala. Ter. & Imp. Co.

V. The basis of this contention is, that the transfer by Woolfolk, the president, and by the treasurer of the collaterals, including the note sued on, is their individual act, without the authority, *virtute officii*, or by any shown delegation of power to dispose of the property of the corporation. The finding is, as has been shown, that these officers were not authorized by any action of the stockholders to make said transfer, and it was never expressly authorized by the directors. If this were all, the contention would have to prevail.—*Speckle v. Spence*, 8 Ala. 264; *Gibson v. Goldthwaite*, 7 Ala. 281. But, these officers, and especially the president, were the active financial agents of the company. It was organized to carry on a business which required the raising, borrowing and expenditure of very large sums of money; the skill and energies of the company, with the assistance of all its friends, were greatly and sorely taxed to raise money with which to build the road, get along, pay the debts, and not to go to protest. It was impracticable, as is the case with every enterprise of the kind, to speak and act, always, through its governing body; and the old rule, requiring such formality,—as we said on another occasion,—in obedience to the demands of the commercial necessity, has been greatly relaxed. Corporations engaged in such enterprises, and incorporated trading companies, would be greatly embarrassed, if required to conform to such corporate action. “Hence, in the ordinary dealings of trading corporations, and within the scope and purview of their chartered powers, the same intendments and implications arise, as would spring out of similar acts or conduct of natural persons.” *Tenn. R. T. Co. v. Kavanaugh*, 93 Ala. 329, 9 So. Rep. 395; *Ga. Pac. R. Co. v. Propst*, 83 Ala. 518, 3 So. Rep. 764. Morawetz lays down the principle, that a corporation has implied authority to conduct its business on liberal principals, and may generally do what an intelligent

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man would do, under similar circumstances.—1 Mor. on Corporations, § 365; 1 Am. & Eng. Encyc. of Law, 369. While, therefore, the officers of a corporation are not free from all obedience to form, so as to be independent of the governing body, and can not perform acts which are *ultra vires*, and while there are many things which, if they do, will not be recognized as binding on their principals, yet, while they act in the line of the business of their companies, without express authority, but manifestly for their interests, it will require but little to show the approval or ratification of the companies.—2 Mor. on Corp., § 675. It is elementary, that an act done by one, representing himself as the agent of another, which he had no express authority from his principal to do, may be ratified by the party for whom he assumed to act. Ratification may be done expressly, or by mere acquiescence, or a failure to repudiate the act, knowing it to have been done, and as effectually by the one, as by the other mode.—2 Kent, 616; Story on Agency, §§ 239, 255, 256; 2 Morawetz on Corp., § 627; 1 Beach on Corp., § 195; *Lyndeborough Glass Co. v. Mass. Glass Co.*, 111 Mass. 315; *Olcott v. Tioga R. R. Co.*, 27 N. Y. 546; 17 Am. & Eng. Encyc. of Law, pp. 127, 162, 163.

Whether this corporation ratified this act of the president, in transferring these collaterals, is one of fact. Proof of circumstances from which the court can reasonably infer, that the act in question was generally known by the stockholders, and more especially so by the directors, is *prima facie* evidence of ratification. The board of directors had authorized the placing of collaterals by the president to borrow money in other instances; the company was hard pressed and was resorting to every known expedient to raise money to carry on its work, and we are not permitted to doubt that every director knew this fact; it had authorized the mortgaging of its lands, even, to place as collaterals for loans; they knew, for the president had informed them, of this large indebtedness of the company to the bank; the books were kept open in Montgomery, and all transactions were entered upon them; the company had an account with the bank, and was borrowing largely from it; it had its check book, on which a memorandum of checks drawn, and to whom was kept; and it is not reasonable

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to suppose its transactions were not known and well understood by the directors, especially, if we presume, as we must, that they did their duty, and by as many of the stockholders as desired to know, or inquire. Besides this, six out of the nine directors ratified the act by a private paper, which, though not a ratification by the directory, is evidence of a knowledge and approval of the act, and of a determination not to disaffirm it. Who can question a legal ratification as binding, as if expressly done, after this finding of all these facts?

This is unlike the cases referred to by defendant, where acts have been done by officers, especially forbidden to be done, except in a certain manner, and according to certain formalities, in which cases, greater strictness of ratification is required, than in placing of collateral paper to borrow money in the current business of a company, like the one whose acts we are considering.—1 Beach on Corp., § 195.

The plaintiffs are parties to whom payment may be legally made, and who can legally discharge the debts, and though the money when collected may not be for their use, or theirs alone, but for other persons, or for theirs and others to whose use they are required to apply or pay it, the action is properly brought in their names.—*Yerby v. Sexton*, 48 Ala. 311; *Hirschfelder v. Mitchell*, 54 Ala. 419.

VI. But it is said, the A. T. & I. Co. was never more than a *de facto* corporation; that the preliminaries to a legal incorporation were never complied with; that there was a positive combination and agreement, that the 20 *per cent.* of the subscription required to be paid in cash, should not be paid, and in fact never was paid.

The findings of the judge on this branch of the defense were, that the A. T. & I. Co. was organized by the election of a board of directors, on the 20th day of January, 1887; that a certificate of the judge of probate of Montgomery county, Alabama (in which county its principal place of business was located) was issued on the 4th day of February, 1887, reciting the facts required to be recited by section 1807 of the Code of 1876; that in the organization of said corporation, the provisions of Art. I. Ch. 1. T. 1. Part 2 of the Code of 1876, were followed in every respect, except that 20 *per cent.* of the capital subscribed was never paid in; that checks

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were given for the cash required to be paid on subscription of stock, and were put in custody of an officer of the company with instructions not to present them, and there was an agreement that they were not to be, and they have never been, collected.

It was further found, that the Alabama Midland Railway Company was incorporated in March, 1887, under the general incorporation laws found in the Code of 1876 as amended; but it did not pay the 20 *per cent.* required to be paid by law on organization; that it received afterwards, the notes of persons for subscriptions to its stock, which notes became the property of the A. T. & I. Co. The only irregularity in the incorporation of either of these companies, that has been suggested in argument, is the non-payment in cash of this 20 *per cent.* of the subscription, required by law as one of the conditions to organization.

It must be admitted, that a substantial compliance with all the terms of a general incorporation law is a prerequisite to the formation of a corporation under it —1. *Morawetz on Corp.*, § 27 *et seq.*; 1 *Spelling*, §§ 37-8; *Cen. Agr. & Mech. Asso. v. Ala. G. L. Ins. Co.*, 70 Ala. 120. But, as was well said in the case last cited, "When an association of persons is found in the exercise and user of corporate franchises, under color of legal organization, their existence as a corporation can not be enquired into collaterally. In a direct proceeding by the government they may be ousted. * * * * The corporation exists *de facto*,—is subject to all the liabilities, duties and responsibilities of a corporation *de jure*. It would produce only disorder and confusion, embarrass and endanger the rights and interests of all dealing with the association, if the legality of its existence could be drawn in question, in every suit to which it was a party, or in which rights were involved, springing out of its corporate existence. No judgment could be rendered which would settle the question finally. But, when the government intervenes by an appropriate proceeding, the judgment is final and conclusive, putting an end to all controversy."—*The State ex rel Sanche v. Webb*, 97 Ala. 111; *Lehman v. Warren*, 61 Ala. 455; *Frost v. Frostburg Coal Co.*, 24 Howard, (U. S.) 279, 284; *County of Macon v. Shores*, 97 U. S. 277; *Casey v. Galli*, 94 U. S. 673; *Appleton M. F. Ins. Co. v. Jesser*, 5 Allen (Mass.) 446;

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4 Am. & Eng. Encyc. of Law, p. 198; Taylor on Corp., § 145; 1 Spelling on Corp., § 43; 2 Morawetz on Corp., § 1022; 1 Morawetz on Corp., § 331.

Another principle equally well settled and recognized, as may be stated in the language of this court in the *Cen. Agr. & Mec. Asso. Case*, *supra*, is, "Whoever contracts with a corporation, having a *de facto* existence, the reputation of a legal corporation, in the actual exercise of corporate powers and franchises, is estopped from denying the legality of the existence of the corporation, or inquiring into irregularities attending its formation, to defeat the contract, or to avoid the liability he has voluntarily and deliberately incurred. The principle is especially applicable to stockholders, seeking to avoid a liability to creditors of the corporation. Their own acts vitalized the corporation, gave it credit, invited and induced dealings with it, and it is true conservatism and sound policy, promotive of right and equity, to seal their lips against contradiction and denial of that which they must be taken to have affirmed, to the injury of strangers who must have trusted the affirmation."—*Snider's Son's & Co. v. Troy*, 91 Ala. 224, 8 So. Rep. 658, and authorities *supra*.

The payment of this 20 *per cent.* as one of the statutory prerequisites to the organization of these companies, can not be availed of as a defense to this action.—*Selma & Tenn. R. R. Co. v. Rountree*, 7 Ala. 670; *Smith v. Tallassee Br. Plank Road Co.*, 30 Ala. 650; *Sparks v. Woodstock I. & S. Co.*, 87 Ala. 294, 6 So. Rep. 195; 2 Morawetz on Corp., § 742.

VII. On the question of fraud and the consequent failure and want of consideration, as set up in the pleas of defendant, the judge, in addition to what has been already stated, finds, that the allegations are not sustained, on these additional grounds: That on the 7th May, 1887, the defendant subscribed for \$500 of the capital stock of the Ala. Mid. Railway Co., the conditions attached to which subscriptions were, as has been above recited; that on July 21, 1887, he executed the note sued on, which contains no reference to stock in the A. T. & I Co.; the subscription contained a stipulation for one-third of his stock in the Alabama Midland Railway Company, to be substituted by an equal amount in the A. T. & I. Co.; that the condition of the note relates only to the time

and manner of the completion of the road, which were fully complied with; that on the same day he gave the note, he accepted from the A. T. & I. Co. its obligation to exchange one-third of its stock for a like proportion of the \$500 in stock of the Ala. Mid. Railway Co., when the note here sued on was paid; that when the note was given, both companies had received certificates of incorporation, such as are provided by law, and had performed all acts entitling them to certificates, except the payment of 20 *per cent.* required by law; and that defendant testified in the case, that no representation was made to him that the 20 *per cent.* had been paid, and he did not enquire or investigate. If one has been induced by fraud to become a stockholder in a corporation, it is true he may set up this fraud as a defense to an action on his stock notes, (2 Mor. § 769; 1 Mor., § 94); but, the findings are satisfactory to show, that the fraud complained of is not sustained.

VIII. There remains another defense, which is, that although so far as this case is concerned, if the corporations are held to be even *de jure* organizations, under the law of 1876, still, that law was expressly repealed by section 10 of the Code of 1886, and that one or two alternatives resulted, necessarily, from this repeal, namely, that the companies were either dissolved by the repeal of their charters, or, they exist under and by virtue of, and subject to, the new law. And, if they were not dissolved, but continued to exist, under the new and not under the old law, then section 1664 of the Code of 1886 became a part of their corporate life, subject to which they had, necessarily, to exist. That section, among other things, provided that a corporation, when duly organized, has power to borrow money, and to mortgage or otherwise convey or pledge its property, real or personal, but it has no power to make such mortgage, conveyance or pledge, otherwise than by the consent of the holders of the larger part in value of the capital stock, expressed by vote, at a meeting of the stockholders, called for that purpose; and inasmuch as the pledge of these collaterals by Woolfolk, as president, to the bank, was not made in conformity to that section, it is *ultra vires* and void.

Generally speaking, the rights of a corporation are determined by the law in force when it came into being,

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though it can not be denied, that by the laws of this State, the charter of either of these companies was subject to amendment or repeal by future legislation.—Art. XIV, § 10 Const. of Ala.; *Chesapeake & Ohio R. R. Co. v. Miller*, 114 U. S. 189

Whether or not an enactment of the legislature shall operate as a repeal or alteration of a charter, where the power is reserved to alter or repeal, is a question of legislative intent. Repeals by implication are not favored, and it has been held, and we think properly, that the repeal of a general incorporation act, and the re-enactment of a new one, does not affect existing corporations formed under the former act; and the object of such legislation would seem, more reasonably and fairly to be, to make provision for future corporations only. The later act will not be held to repeal the former one, unless there is an express intention to do so, or a necessary implication to that effect, arising from the enactment.—2 *Spelling on Corp.*, § 1066; 2 *Morawetz on Corp.*, § 1110; *Freehold Mut. Loan Asso. v. Brown*, 29 N. J. Eq. 121; *United Hebrew Benevolent Asso. v. Benshimol*, 130 Mass. 325; *Donworth v. Coolbaugh*, 5 Clarke (Iowa) 300.

That it was not the intention of the legislature to repeal the general incorporation law of 1876, as to corporations formed under it, but to enact a new law, extending the provisions of the old, perfecting it in many of its details and supplying some of its omissions, without any purpose to interfere with corporations formed under the former, is manifest from some of the new provisions of this new system, as we find them in the Code of 1886.

Section 1528 provides, that any banking corporation or loan association, *which has been* or may be organized under any law of this State, may be organized and do business under the provisions of this chapter, upon complying with the conditions following—setting them out. Of course, the necessary implication is, that the charter, under the former law still exists, and it may continue under the old, with an option to reorganize under the new, upon complying with certain conditions. Section 1535 provides, that an insurance company, when organized under the new system, “*and any such company heretofore organized,*” shall have the power conferred by that section. So, sections 1535 and 1539 extend their provisions to insurance companies,—the first, to those

"now organized, * * or which may be hereafter organized under this chapter," the latter, to "a corporation organized under this chapter, or *any insurance corporation heretofore organized under the laws of this State.*" And sections 1586, 1587, 1594, and 1595,—the two former being old sections and the two latter being new,—each makes provision for railroad companies organized under former laws. In these several sections we have a clear manifestation of the legislative recognition of the existence of former corporations, chartered under previous general law. We conclude, therefore, that without reference to section 10 of the Code, and whether the corporation law of 1876 was repealed or not by that section, the charters of corporations formed under that law were not repealed, but were left by the new law as they were previously organized.

In Massachusetts, a corporation was organized under general statutes enacted for the purpose. Later these general statutes were repealed by the legislature, which later repealing statute substantially re-enacted the provisions of the old law, so far as it related to the creation of such corporations. The question having arisen, whether the charter of the corporation, formed under the repealed statute was also repealed and destroyed by the repeal, the court said: "It is contended that as the statute of 1874 contained no reservation, it operated to destroy all corporations created under the provisions of the general statutes. * * But it is plain that the statute of 1874 was not passed for the purpose of affecting the rights of corporations already organized. The repeal of a general corporation law can not be construed, in the absence of express provisions, as intended to repeal the charters of corporations formed under it, especially when the manifest purpose of the repealing act is to substitute a new law, extending the provisions of the old, and perfecting its details, but not changing its general policy."

We think the old system was repealed in the enactment of the new, and no corporations may now be organized under the provisions of the Code of 1876; but that, as for all companies incorporated under the old law, they are continued of force under the provisions of that system.

IX. It is argued once more, that the findings show that the note sued on was pledged for all the alleged

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debt then existing; that \$30,000 of this debt is held and owned by the Farley National Bank, while the plaintiffs own the remainder, and all the collaterals have been transferred to the plaintiffs; that the debt and the collaterals placed to secure it, have thus parted company, and section 1784 of the Code which provides, that a transfer or assignment of collateral security pledged to secure the payment of a debt, not accompanied by a transfer of the debt, is a discharge of the pledge, restoring the right and title of the person from whom received.

This argument proceeds on a mistake as to the finding. As appears from the findings, the amount of the debt assigned to the plaintiffs was \$107,308.85. It was originally—as shown by the resolution of assignment by the bank to plaintiffs, (made a part of the findings)—\$151,008.99, on which were credits of \$10,000 cash, paid by the company, \$30,000, the three notes given by the company to the bank—the \$30,000 to which defendant is referring as the basis of this objection—and \$3,700.14, together, making \$43,700.14 of credits, on the original debt of \$151,008.99, which being deducted, leaves \$107,308.85, the balance of said original debt, which was transferred to, and is held by plaintiffs, for which all of said securities were transferred to them, to collect and pay, as well as the said sums of the three notes for \$30,000, which the bank holds.

But the original debt, for which the securities were pledged, and the securities have not parted company. That debt and the securities are, together, in the hands of the plaintiffs, as shown by the findings. If a question might be raised, whether any of the proceeds of the collections of those collaterals can be applied towards the payment of these three notes now held by the bank, it will be one between the A. T. & I. Co., the party for whose benefit the provision in the section of the Code referred to applies, and the plaintiffs, and does not arise in this case between defendant and them.

When he pays his note to the plaintiffs, he will have a full discharge,—the only point, on this branch of the case, in which he is interested.

The judgment of the court below is affirmed.

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Kahn v. Hall, et al.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN M. CHILTON, Special Judge.

This action was brought by J. L. Hall and L. B. Farley, as trustees, against the appellant, M. Kahn, and counted on a promissory note, given by the defendant to the Alabama Midland Railway Company, for the amount of his subscription to the capital stock of said company. This note was subsequently, together with other collaterals, transferred to the Alabama Terminal & Improvement Company, which latter company transferred the same to the Farley National Bank, and while in the possession of said bank they were transferred to the plaintiffs. The cause was tried by the judge without the intervention of a jury, who, at the request of the parties, rendered a special finding. There was judgment for the plaintiffs, and the defendant appeals, and assigns as error the rendition of said judgment.

The facts of this case are identical with the facts of the case of *Bibb v. Hall and Farley*, ante p. 79, and were submitted together. The attorneys were the same in each case, and the same briefs were filed.

HARALSON, J.—This case is affirmed on the authority of the case of *Bibb v. Hall and Farley*, ante p. 79.

Heard v. Hicks, et. al.*Action on Replevy Bond.*

1. *Replevy bond; statutory requirements.*—A replevy bond given by the defendants in a detinue suit, which contains no condition or obligation to pay costs or damages, does not conform to the requirements of the statute, and is not a statutory bond; but is binding as a common law obligation.

2. *Attorney's fees are not recoverable in a suit on a replevy bond.*—In an action on a replevy bond, given by defendants in detinue, which
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contains no stipulation for the payment of damages, attorney's fees are not recoverable; sureties are bound only to the extent expressed in their obligation or imposed by law.

3. *Ruling on pleading; when shown only by bill of exception.*—When rulings on pleadings are shown only by bill of exceptions, they are not revisable on appeal.

4. *Action on replevy bond; tender by defendant of assessed value of property.*—When pending an action of detinue, and after the execution by the defendants therein of a replevy bond, a part of the property was destroyed by fire, a tender by the defendants, within 30 days after the rendition of the judgment, of the value of the property so destroyed, as assessed in the detinue suit, meets the obligation of the bond as to the property so destroyed; and it is the duty of the plaintiff to accept the tender.

5. *Same; plaintiff entitled to compensation for injury to property injured; evidence of damage admissible.*—When, after the execution of a replevy bond by the defendants in an action of detinue, and pending the suit, a portion of the property replevied is damaged, but not wholly destroyed, by fire, the plaintiff is entitled to compensation for the injury to the property, and evidence tending to show the amount of damage is competent and relevant.

6. *Same; waiver of claim for damages by plaintiff a question for the jury.*—In an action on a replevy bond, when there is testimony tending to show that after the alleged tender of the property replevied by the defendants, the plaintiff exercised control over the property tendered, it is a question for the jury, whether or not he refused such property, and shall be held to have waived his claim for damages to it while in defendant's possession.

7. *Same; plaintiff estopped.*—In an action on a replevy bond, if it is shown that the plaintiff, with knowledge thereof, received property in lieu of that for which he sued in the detinue suit, and for which defendants gave the replevy bond, and, after being informed of the substitution, retained the substituted property, exercising acts of ownership over it, he is estopped from claiming a forfeiture of the bond for the non-delivery of the property originally sued for.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by the appellant, Geo. P. Heard, against the appellees; and sought to recover damages for the breach of a replevy bond given by the appellees, J. A. Hicks, C. B. Hicks and J. E. Hicks, as principals, and the other defendants as sureties, conditioned to return the property sued for in a detinue suit brought by Heard against the principals, if the defendants were cast in said suit.

It is unnecessary to notice the rulings upon the plead-

ings, since they are shown only in the bill of exceptions. The facts which led up to the present suit on the replevy bond are sufficiently stated in the opinion. The plaintiff offered in evidence the replevy bond and the judgment of the circuit court recovered by him in the detinue suit, and rested his case.

The defendants introduced evidence tending to show that on December 24, 1887, within 30 days after the rendition of judgment in the detinue suit, they tendered to the plaintiff a mule and wagon and three head of cattle; that they also tendered the engine and told the plaintiff that it was at the Hicks place, where it was when the detinue suit was brought, "but that they would deliver it at Georgiana, the home of the plaintiff, if he desired it;" that one of the defendants tendered to the plaintiff \$150 in money, the assessed value of the gin and grist mill and fixtures, which were destroyed by fire before judgment in the detinue suit. Of the three head of cattle, which were tendered to the plaintiff, two were the same cattle, and the third was a different one from those recovered in the detinue suit. There was also tendered with these cattle a calf, which was the increase of one of the cows recovered in the detinue suit. The testimony further tended to show that when these tenders were made plaintiff refused to accept any of the property tendered, saying that he was not the proper person to whom it should be delivered; but that afterwards the mule and wagon and cattle were placed in his possession, and he exercised acts of ownership over them. It was a conceded fact that the injury to the engine and the fixtures occurred after the replevy bond was executed, and before judgment in the detinue suit was recovered by the plaintiff. The plaintiff's counsel asked the plaintiff, whether there was any difference in the condition of the engine on the 24th of December from what it was at the time of the execution of the bond, which was the foundation of the suit? The defendants objected to this question, the court sustained the objection, and the plaintiff duly excepted. The plaintiff then offered to prove by himself that the engine had been burnt after the execution of the bond, but before the recovery of the judgment in the detinue suit. Upon the defendant objecting to this evidence, the court sustained the objection, and the plaintiff duly excepted. The

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plaintiff as a witness was then asked the following question: "What was the difference in value of the engine when the bond was given in April and when it was tendered in December?" The court sustained the defendant's objection to this question, and the plaintiff duly excepted. The other facts are sufficiently stated in the opinion. The court, in its general charge, among other things, gave the following instructions: (1.) "That if Heard, the plaintiff, accepted the three cows, then he was estopped from insisting on the breach of the bond so far as the failure to deliver the three cattle is concerned." (2.) "That it was competent for the defendants, if they committed a breach of the bond as to the mill and gin and their fixtures to tender the amount of their value, and that it was the duty of Heard to receive it, if a tender as to that was made." (3.) "That if the defendants tendered or offered to deliver the engine to Heard, then he was in his own wrong, if he refused it, and can not recover for the failure of the defendants to deliver the engine, if it appears to their reasonable satisfaction that defendants are ready and able to deliver it." (5.) "That if Heard came into the possession of the property after the 30 days by delivery from defendants, then he can not recover the assessed value of the property because he had gotten all that he was entitled to." The plaintiff separately excepted to each of these parts of the court's general charge.

There were many charges requested by the plaintiff, to the court's refusal to give each of which he separately excepted; and there were several charges given by the court at the request of the defendants, to the giving of each of which the plaintiff separately excepted; but it is unnecessary to set these charges out at length.

There was judgment for the defendants. The plaintiff appeals, and assigns as error the several rulings of the trial court upon the pleadings, the evidence, and the charges.

J. C. RICHARDSON and GAMBLE & POWELL, for appellant. The bond declared on is not a statutory bond, Code, § 2718, and yet it is good as a voluntary undertaking or common law bond, and as such must receive such construction as will effectually accomplish the intent of the parties to it.—*Mitchell v. Ingram*, 38 Ala. 395; *Russell v.*

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Locke, 57 Ala. 421; *Rose v. Pearson*, 41 Ala. 253; *Sugg v. Burgess*, 2 Stewart 509; *Tuck v. Moses*, 58 Me. 572; *Moss v. Holdson*, 5 Mass. 318. The identical property taken under the bond must be returned, and must be in as good order as when taken.—*Irving v. Smith*, 68 Wis. 227; *Parker v. Simonds*, 8 Met. 211; *Gibbs v. Bartlett*, 2 W. & S. (Pa.) 34; *Wright v. Quirk*, 105 Mass. 45; *Peck v. Wilson*, 22 Ill. 206; *Nickerson v. Chatterson*, 7 Cal. 570; *Allen v. Fox*, 51 N. Y. 562. The alleged tender by the defendants was insufficient.—*Camp v. Simon*, 34 Ala. 126; *Holmes v. Holmes*, 12 Barb. 137.

STALLINGS & WILKINSON, *contra*. (No brief on file.)

STONE, C. J.—An action was brought by the plaintiff Heard against J. A. Hicks, C. B. Hicks and J. E. Hicks, for the recovery of certain chattels in specie, under section 2717 of the Code of 1886. The plaintiff made oath and gave bond, and obtained a writ of seizure, which the sheriff executed by seizing the property sued for. This property the sheriff permitted to remain with defendants, upon the execution by them of a bond to the plaintiff, with Owen, Parker and two Goodwins as sureties. The condition of this bond was that, "If the said J. A. Hicks *et al.*, defendants in said suit, within thirty days after the determination thereof, if cast in said suit, deliver to the said George P. Heard the above described property, then this obligation is to become void; otherwise to remain in full force and effect." The bond contains no condition or obligation to pay costs or damages. The bond expresses as its penalty the sum of seven hundred and sixty dollars, and we have copied the entire condition. It will be seen that it does not conform to the statutory requirements.—Code, § 2717.

The trial of the detinue suit, or suit for the recovery of chattels in specie, took place November 25, 1887, and resulted in a verdict and judgment for plaintiff for most of the property sued for. The judgment, following the verdict, was as follows: "It is, therefore, considered by the court that the plaintiff have and recover of the said J. A. Hicks and J. E. Hicks the said steam engine and fixtures, said gin and fixtures, said bay mare mule, said wagon and said three head of cattle, or the alternate value of said steam engine and

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fixtures of three hundred dollars; the value of the gin and fixtures of seventy-five dollars; the value of the grist mill and fixtures seventy-five dollars; the value of the bay mare mule of fifty dollars; the value of the wagon ten dollars; and the value of the three head of cattle of \$8 each, being twenty-four dollars." There was neither verdict nor judgment for damages for the detention of the property; nor was there inquiry in the detinue suit, so far as the present record informs us, of any damage done the property pending the suit.

After the institution of the detinue suit, but before trial and judgment—the property sued for being in the possession of J. A. and J. E. Hicks—the mill and gin and their fixtures were burned, and the engine was seriously impaired in value as a consequence of the burning.

The breach complained of, and damages claimed in each count of the complaint are stated as follows: "And the plaintiff avers that the said J. A. Hicks was cast in said suit, and within thirty days after the determination thereof did not deliver to said Geo. P. Heard the above described property, and that the plaintiff has been greatly damaged thereby, in this: (1.) That by reason of said failure of said J. A. Hicks to deliver the said steam engine aforesaid, the plaintiff has been damaged in the sum of \$300, with the interest thereon from, to-wit, the 25th day of December, 1887. (2.) That by reason of the failure of the said J. A. Hicks to deliver the said grist mill to plaintiff as aforesaid the plaintiff has been damaged in the sum of \$75, with the interest thereon from the 25th day of December, 1887. (3.) That by reason of the said failure of the said J. A. Hicks to deliver the said gin, the plaintiff has been damaged in the sum of \$75, with the interest thereon from, to-wit, the 25th day of December, 1887. (4.) That by reason of the failure of the said J. A. Hicks to deliver the said bay mare mule, the plaintiff has been damaged in the sum of \$50, with the interest thereon from the 25th day of December, 1887. (5.) That by reason of the failure of J. A. Hicks to deliver said wagon, the plaintiff has been damaged in the sum of \$10, with interest thereon from the 25th day of December, 1887. (6.) That by reason of the failure of said J. A. Hicks to deliver the said three head of cattle, the plaintiff has been damaged in the sum of \$24, with the interest thereon from December 25th, 1887."

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It will be borne in mind that the delivery or replevin bond contains no stipulation binding the obligors for any damages that the plaintiff might suffer in consequence of the giving thereof. For this, as well as other reasons, it is unnecessary for us to consider the claim asserted in this suit for attorney's fees incurred in the detinue suit. Sureties are bound only to the extent expressed in their obligation, or imposed by law. They stand on the terms of their contract.

Several pleas were interposed to the action, to some of which plaintiff filed demurrers. The rulings on the demurrers are shown only in the bill of exceptions. Under our rules of practice we are forbidden to consider these demurrers, but must presume they were abandoned.—3 Brick. Dig., 78, § 7; *Powell v. State*, 89 Ala. 172, 8 So. Rep. 109; *Beck v. West*, 91 Ala. 312, 9 So. Rep. 199. It results that we must try this case as an issue joined on all the pleas, without considering their legal sufficiency.

Pending the detinue suit, and after the execution of the replevin bond, a fire destroyed the mill and gin, and damaged the engine. No proof was offered in explanation of the fire, or its origin, and no special blame is imputed to the defendants on account thereof. The recovery in the detinue suit, however, demonstrates that, to the extent the plaintiff had verdict and judgment, the property was his at the institution of the suit, and, as a consequence, the possession and use of it by the defendants in the detinue suit was wrongful.

The rulings of the circuit court in reference to the gin, the mill, the mule and the wagon were clearly free from error. The mule and wagon were tendered within thirty days after the judgment was rendered, and the plaintiff had the benefit of them. The mill and gin having been entirely destroyed by fire, they could not be delivered. Their alternate values had been assessed and made the judgment of the court, and before the thirty days expired those alternate values were tendered to the plaintiff. The complaint in the present suit claims the values of the mill and gin only at the prices fixed in the detinue recovery. The proof fully sustained this branch of the defense, and the circuit court's rulings in reference thereto are free from error.

The engine and boiler present a different and graver

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question. These had been injured by the fire, but were not destroyed. The defense relied on as to these was tender; but no offer was made to pay for the depreciation caused by the burning. The circuit court refused to receive testimony of such injury, and the plaintiff excepted.

The chattel or chattels sued for, together with damages for the detention, are the primary recovery in an action of detinue. But inasmuch as the chattel may perish, or become otherwise inaccessible, the rule and law of this action are that the alternate value of the property sued for must be ascertained and adjudged. And when more chattels than one are the subject of the recovery, the separate values must be ascertained and determined. This, because some of the chattels may, after judgment, be accessible and recoverable in specie, while others may be beyond reach. In this way the successful plaintiff has his rights secured to him, not alone by regaining possession of his property that remains accessible, but, also, by recovering the ascertained value of such part as may have gotten beyond the reach of process. So, when there is a recovery in detinue, the plaintiff must accept the specific thing recovered, unless by some default of the defendant he has armed the plaintiff with the right to demand, at his option, not the property itself, but its ascertained, alternate value. The damages for detention, recoverable by plaintiff, are intended to compensate him for the injury he has sustained by being kept out of the possession and use of his property. Reasonable hire, taking into the account the injury to the chattel caused by its use, if there be no exceptional features in the case, will mark the plaintiff's measure of recovery, under the head of damages for detention.

But exceptional cases arise. The chattel detained may sustain a serious injury, very materially impairing its value beyond that which would result ordinarily from its use. Now, as this injury and impairment of value accrue to plaintiff's property while defendant is tortiously withholding from him his right to possess and enjoy it, this abuse becomes a legitimate item and subject for the inquiry of damages for the detention. This, for the reason that if the chattel had not been wrongfully detained, it does not appear that the injury would

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have ensued. Hence, *prima facie*, the injury is the result of the detention—the wrongful detention—which withholds the property from its rightful owner. In *Wortham v. Gurley*, 75 Ala. 354, 363, this court said, “that the damages required to be assessed for the detention of the property included any deterioration in its value occasioned by the default of the wrong-doer, through neglect, abuse, or non-use, during the period of detention. This injury is shown to have resulted from the tortious act of seizure and detention as its natural and proximate cause, and was a legitimate element of damage in addition to the value of rent or hire.” See also 2 Sedgewick on Damages, (7th Ed.), 498 *et seq.*; *Freer v. Cowles*, 44 Ala. 314; *Wilkerson v. McDougal*, 48 Ala. 517; *Archer v. Williams*, 2 Car. & Kir. 26.

Having ascertained the extent of liability the defendant Hicks rested under for the use and abuse of the engine pending the detinue suit, what is the liability of his sureties on the replevin bond in relation thereto? They bound themselves as sureties of Hicks that the latter, if cast in the action, would within thirty days surrender the property. They thereby took upon themselves the same duty and obligation to surrender the property which rested on Hicks, and assumed all his liabilities for the non-delivery. We have shown that his possession of the property pending the litigation was that of a tort-feasor, and that this was conclusively shown by the verdict and judgment in the detinue suit. We have shown further that detaining and holding the property, as he did, without right, it was his duty to restore it in the condition it was in when he executed the bond, ordinary wear and tear excepted. Burning a house over the engine could not fail to injure it materially beyond the mere deterioration of it from use, and therefore brought it within the principle that a tender of property thus circumstanced is not a full discharge of the obligation to deliver. The circuit court erred in not receiving testimony of the injury done the engine from the burning, and in holding that the plaintiff was bound to accept the engine, if materially damaged, in discharge of the bond.

There was some testimony tending to show that after the alleged tender the plaintiff exercised some control over the engine. If this be so, it will present a question

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for consideration by the jury, under the court's direction, whether or not he received the engine, and whether he thereby waived, or intended to waive all claim for damage it had sustained.

The question in reference to the cattle. If the plaintiff, with knowledge, received one or more cows in lieu of those embraced in the mortgage; or, if after being informed of the substitution, he retained such substituted cows, exercising acts of ownership over them, this would estop him from claiming a forfeiture of the bond for the non-delivery of the cattle, or any part of them.

Reversed and remanded.

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Action of Trover by Landlord against Tenant for Wood cut from Rented Premises.

1. *Action of trover by landlord against tenant for wood cut from rented premises.*—While an action of trespass for injuries to land by the tenant can not be maintained by the landlord, so long as the tenancy continues, and trover can not be maintained by the owner of the land against one in adverse possession for the conversion of timber severed from the freehold, a landlord can maintain an action of trover against his tenant, pending the tenancy, for wood wrongfully cut from the demised premises, and converted by the tenant. Such action involves no inquiry as to the title of the land from which the severance was made, and no inquiry as to the possession of said land.

2. *A claim of forfeiture by landlord and a denial of forfeiture by tenant do not show adverse holding; exclusion of such evidence not error.*—The facts that the landlord claimed a forfeiture of the lands because of the wrongful severance by the tenant of timber from the leased premises, and that the tenant denied the forfeiture, and put the landlord to an action of ejectment to recover the land before the lease expired, which action was pending and being resisted by the tenant when the landlord brought an action of trover against the said tenant to recover for the conversion of the timber wrongfully severed, do not tend to show that the tenant held the land adversely to the landlord; and the exclusion of such evidence in the action of trover is not erroneous, and affords no ground of complaint to the defendant therein.

8. *The lease competent evidence in an action of trover by landlord against tenant.*—In an action of trover by the landlord against his ten-

101	111
104	496

101	111
124	487
124	498

101	111
130	530

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ant, pending the lease, for the conversion of timber wrongfully cut from the demised premises, it is competent for the landlord to introduce in evidence the lease that was current at the time such suit was brought, as showing that the defendant's possession was not adverse to the plaintiff.

4. *Same.*—The fact that part of the lease so introduced in evidence might be looked to by the jury to determine what were the stipulations of a previous lease between the same parties in a certain particular, furnishes no ground for the exclusion of the lease, or the part specially objected to; and the fact that the provision singled out tends to contradict the oral testimony of defendant, of itself, makes the overruling of the motion correct.

5. *Bills of exception no part of the record; rulings on the pleading shown only therein will not be considered on appeal.*—A bill of exceptions is no part of the record of the trial court, and rulings on the pleading which are not shown by the record proper, but appear only in the bill of exceptions, will not be reviewed by the appellate court.

6. *Objection to deposition; when too late.*—An objection to a deposition, which is not made before the trial is entered upon, and it is not shown that the ground of the objection transpired or became known to the party objecting only after the trial began, comes too late and is properly overruled.

7. *Objection to testimony because not responsive; when properly overruled.*—If a part of the testimony of a witness, as shown by her deposition, is not responsive to the cross interrogatory under which it was given, but was competent evidence in the cause, and was but the repetition of facts to which the witness had deposed, in response to interrogatories in chief, an objection to such testimony is properly overruled.

8. *Measure of damages in trover for conversion of wood.*—In an action of trover for the conversion of wood wrongfully cut from the leased premises, the measure of damages is the value of the wood at the time of the conversion, with interest to the time of trial.

9. *Burden of proof as to release of cause of action.*—In an action of trover by the landlord against the tenant for the conversion of wood wrongfully cut from the rented premises, where the tenant claims that the landlord had released the cause of action, the burden of proving such release is upon the tenant.

10. *Landlord's acceptance of rent not a release for conversion of wood by tenant.*—While the facts that the acceptance by the landlord of rent from his tenant, for a period subsequent to the wrongful severance of trees from the leased premises and the conversion thereof by the tenant, and that the landlord executed a new lease for a subsequent time, may amount to a waiver of the forfeiture of the lease current at the time of the severance, they do not operate as a release of the tenant's liability for the wood wrongfully severed and converted by him.

11. *Charges invasive of the province of the jury.*—In an action of trover for the conversion of timber wrongfully cut from the leased prem-

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ises, a charge instructing the jury that if they believe from the evidence that the defendant cut down the trees and converted them under the belief that he had the right to do so under the lease, they "should fix the value of the wood at the place it was cut, after deducting the cost of cutting the same, and after deducting the cost of hauling the same," is properly refused as being invasive of the province of the jury.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

This was an action of trover instituted by Mrs. Charlotte Thompson Rogers against John D. Brooks on April 22, 1891; and sought to recover damages for the wrongful conversion by the defendant of a large quantity of wood which had been cut and severed from the plantation of the plaintiff. There was a demurrer interposed to the complaint, but the record discloses no ruling thereon. The bill of exceptions states that the defendant pleaded the general issue and, by special pleas, set up as a defense, that at the time of the alleged conversion he was in the actual possession of the property, from which the trees were cut and the wood sold, as the tenant of the plaintiff, and, as such tenant, he was "claiming use, occupation and possession of the said property adversely against the plaintiff and all the world for the term of said lease;" and that whatever portion of said wood was converted was in fact cut down and severed from the property during the continuance of such adverse holding and possession. There were demurrers interposed to these pleas, but the rulings of the court thereon are only shown in the bill of exceptions, which makes it unnecessary to set them out in this statement. The judgment-entry recited that issue was joined on the pleas. In accordance with the verdict of the jury, there was judgment for the plaintiff, assessing her damages at \$2,603.

On the first trial of this cause in the court below, the jury failing to agree upon a verdict, there was a mistrial. Upon the cause coming up for the second trial, the bill of exceptions recites that "The defendant informed the court that since the last term of this court the plaintiff had rescinded the lease under which the defendant held, and claimed right of possession to said plantation described therein, from which the said trees were alleged to have been severed and converted into wood, for the value of which the suit is prosecuted; and that the

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plaintiff had commenced an action of ejectment in this court against the said defendant herein for the possession of said plantation, and that said defendant has refused to surrender the possession of said plantation to the plaintiff, and was then resisting said action of ejectment, and had filed in this cause the plea which was then read to the court." This plea alleges as a defense that at the time of the hearing of this cause the defendant was in the actual use, occupation and possession of the property described in said suit and claimed the same adversely against the plaintiff and all the world for the term of said lease, at the time of the alleged conversion of said wood, and that the defendant had not committed any breach of the contract of lease, and, therefore, refused to surrender the possession of said plantation. The defendant then moved the court to allow this plea to be filed as a plea in this suit; but upon the plaintiff's objection and motion to strike said plea from the file, the court refused the motion of the defendant and struck the plea from the file. To this ruling of the court the defendant duly excepted. Thereupon, as is stated in the bill of exceptions, the defendant pleaded the general issue "in short by consent, with leave to give in evidence any matter that might be introduced under a special plea."

The testimony for the plaintiff tended to show that her plantation was leased to the defendant in 1883 through her attorneys and agents, Sayre & Graves, for five years; that this contract of letting was in writing and had been misplaced; that one of the provisions of this contract was that the tenant was not to cut or destroy any of the wood or timber on said plantation except for farm purposes, and such timber as would be necessary to reclaim and clear up such of the land as had grown up in small pines; that at the expiration of this lease the defendant again, by a verbal lease, rented from Sayre & Graves the said plantation for a term of one year from January 1st, 1888, to January 1st, 1889; that when the plaintiff and her husband went upon the plantation in the early part of the year 1888 they discovered that a great deal of the timber had been cut from the plantation, and that the defendant had converted the same to his own use, selling it in open market; and that upon ascertaining this fact the plaintiff objected. It was fur-

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ther shown that on March 15, 1888, the plaintiff made with the defendant a written lease for five years from January 1st, 1889, having therein the express covenant on the part of the defendant, that he would not "cut down nor destroy any of the wood or timber on said premises, except such as are absolutely necessary for the plantation purposes, for fuel, repairs, and improvements to be used or placed thereon;" and it was expressly stipulated that in the event of the breach of this covenant or any of the covenants contained in said contract of letting the lease could be rescinded by the plaintiff. It was also in evidence on the part of the plaintiff that the original lease made in 1883 contained similar covenants and stipulations.

The evidence for the plaintiff tended further to show that during the pendency of the 1st, 2d and 3d leases the defendant had cut down and converted to his use a large quantity of timber and wood from the plantation of the plaintiff. Upon the plaintiff's introducing in evidence the lease executed on March 15, 1888, the defendant objected, because the evidence showed that said lease was not in force at the time of the alleged wrongful cutting of wood, for which the suit was prosecuted. The court overruled this objection and the defendant duly excepted.

Upon the examination of Loraine Rogers as a witness for the plaintiff, the defendant handed him the written notice of the rescission of said lease of March 15, 1888, which notice was dated December 4, 1891, and asked the witness if the said notice had not been served on the defendant. The plaintiff objected to this question, whereupon "the defendant read said notice to the court, and stated to the court that he expected to show by said witness that since the mistrial of the case at the last term of said court, the plaintiff had served defendant with a written notice of alleged forfeiture of said lease of March 15, 1888, on the part of the defendant, and had notified defendant that she had rescinded said lease on account of said forfeiture, and demanded possession of said plantation of the defendant as shown by said notice," and that the defendant had denied said forfeiture and refused to surrender the possession of said plantation, except on terms and conditions stated by the defendant. The court sustained the objection of the

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plaintiff, and the defendant duly excepted. The defendant then offered to introduce in evidence, for the purpose of having the same identified by the witness Loraine Rogers, another communication dated Nov. 19, 1891, from the plaintiff and her husband addressed to the defendant, in which, after stating the cause of the forfeiture of the lease, and notifying said Brooks of her rescission for such reason, she demanded the immediate possession of her plantation. The plaintiff objected to the admission of this instrument, the court sustained the objection, and the defendant duly excepted. The defendant sought to introduce in evidence the summons and complaint in the ejectment suit, but upon the objection of the plaintiff, the court refused to allow the same to be introduced, and the defendant duly excepted. Upon the witness, Loraine Rogers, being asked as to the value of the wood cut from the plaintiff's plantation, the defendant objected to such testimony, and duly excepted to the court's overruling his objection. The defendant moved to exclude from the jury that portion of the lease of March 15, 1888, which prohibited the cutting of wood or timber on the plantation, on the ground that this provision in said lease was not shown to be the same as that in the lease pending at the time of the alleged conversion of the trees, for the value of which this suit was prosecuted. The court overruled this motion, and the defendant duly excepted.

Upon the introduction of the deposition of the plaintiff the defendant objected thereto "because said deposition was taken prior to the trial of the cause in this court at the last term of this court, and for the purpose of being used on that previous trial, on the ground that the plaintiff was not a resident of Alabama, residing in New York; but she was now a resident of the city of Montgomery, and could be put on the stand as a witness. The court overruled this motion, and the defendant duly excepted.

In the sixth interrogatory propounded by the defendant to the plaintiff, the question was asked if the husband of the plaintiff, acting as her agent, had not consented, at the time of making the last lease with the defendant, that he, the defendant, could haul and sell wood cut from a certain portion of the leased premises. To this cross interrogatory the plaintiff answered, "that

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she has never given verbal permission to cut wood on her plantation, and that the only permission she has given is in the lease signed in March, 1888." The defendant moved the court to exclude from the jury the plaintiff's answer to this cross interrogatory, on the ground that it was not responsive to the said cross interrogatory, and was irrelevant and incompetent. The court overruled this motion, and the defendant excepted.

In the second cross interrogatory propounded to the plaintiff there was asked, among other questions, the following: "Did not his [defendant's] lease cover the whole plantation, and give him the right to cultivate any part thereof, and to reclaim lands lying out and uncultivable?" Among the other answers given by the plaintiff to the second cross interrogatory she answered as follows: "She is certain it (the lease) gave him no right to cut timber for other than plantation purposes." The defendant moved the court to strike out from the jury this portion of the answer of the plaintiff to the second interrogatory, on the ground that the same was not responsive to said interrogatory. The court overruled the objection and motion, and the defendant duly excepted.

The testimony for the defendant tended to show that under his lease he had the right to clear up the property, and cut down such trees as were necessary; that on a visit to her plantation by the plaintiff and her husband defendant said to them that it was necessary for him to cut the wood and sell the same in order that he could pay the rent, but if Mr. Rogers objected he (the defendant) would stop; and that thereupon the husband of the plaintiff said: "Oh no, go ahead." The testimony for the defendant further tended to show that he had paid the rent regularly every year as the same fell due.

The defendant separately and severally excepted to the following portions of the general charge given by the court: "The fact that another suit is pending here for the recovery of the land, from which the wood was cut, can have no influence on the right of recovery by plaintiff whatsoever in this suit." "That the plaintiff was entitled to recover interest on whatever wood that they might find defendant was chargeable with cutting, from the time of the cutting of the wood." At the request of the plaintiff, the court gave the following written

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charges to the jury: (1.) "If the jury find for the plaintiff, they should give her the value of the wood from the time it was cut by defendant, with interest thereon from the time it was cut by him." (2.) "That the burden is on the defendant to establish to the satisfaction of the jury, that the plaintiff, Charlotte Thompson Rogers, agreed, as a part of the lease made between her and defendant in March, 1888, that he should be released from all damage from cutting wood on her land." The defendant separately excepted to the giving of each of these charges; and also separately excepted to the court's refusal to give each of the following written charges requested by him: (1.) "The court charges the jury that if they believe the evidence, they must find a verdict for the defendant." (2.) "The court charges the jury that if they believe from the evidence, that the wood alleged to have been converted by the defendant was cut from trees which were severed by defendant from the land known as the Charlotte Thompson Place, and which lands were in the actual occupation and possession of said defendant under a lease from the plaintiff to him for the payment of rent, holding and claiming said lands, and in the actual occupation and possession thereof, under said lease against the plaintiff, and against her right of entry on said lands at the time said trees were severed from said land, and also at the time of the commencement of this suit, and up to the trial of this cause continuously, then the jury must find a verdict for the defendant." (3.) "The court charges the jury that if they believe from the evidence that the wood alleged to have been converted by the defendant was cut from trees severed by the defendant, from lands on the Charlotte Thompson Place, and that said lands were in the actual occupation and possession of said defendant under a lease to him by the plaintiff for the payment of rent therefor, under which the defendant claimed, and held possession of said lands against the plaintiff, and against her right of entry thereon for the term of said lease, at the time said trees were severed from said lands, and also at the time of the commencement of this suit continuously up to the present time, then the jury should find a verdict for the defendant." (4.) "The court charges the jury that if they believe from the evidence, that said wood alleged to have been converted by the defendant was cut from trees that

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were severed from lands on the Charlotte Thompson Place, which was in the actual occupation and possession of said defendant under a lease made to him by the plaintiff at a stipulated rent for said lands, claiming and holding the lands thereunder against the plaintiff and her right of entry thereon, at the time said trees were severed by the defendant from said lands, and at the time of the commencement of this suit continuously up to the present time, and that the plaintiff has, since that time, rescinded said lease, and notified defendant thereof, and demanded of him the surrender of the possession of said lands, and that defendant refused to surrender said possession thereof, and that she then commenced an action of ejectment against said defendant for the possession of said lands, and that said action is pending, and is resisted by the defendant, then you should find a verdict for the defendant.” (5.) “The court charges the jury that if they believe from the evidence, that defendant was in the actual occupation and possession of lands, known as the Charlotte Thompson Place, claiming and holding the same, under a lease for rent from the plaintiff to the defendant, against the plaintiff, and against her right of entry on said lands for the period of said lease, at the time the said trees, which were thereafter converted into wood, the value of which is the subject matter of this suit, and that defendant was also in the actual possession, and occupation of said lands as aforesaid, at the commencement of this suit, and since that time to the present, claiming the same as aforesaid, then such possession would be adverse to the plaintiff, and in that event, this suit can not be maintained, and you should, therefore, find a verdict for the defendant.” (6.) “The court charges the jury, that if they believe from the evidence that the plaintiff was not in the actual possession of the lands, from which said trees were severed by the defendant, at the time they were severed, and thereafter converted by him into wood, and if she can show title to said trees severed as aforesaid from said lands, only by showing title to the lands; and if the defendant has been in the actual occupation and possession of said lands since the severance of said trees as tenant of plaintiff under a lease for the payment of annual rent for said lands up to the present time, then this action will not lie, and in that event you should find a verdict

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for the defendant." (8.) "The court charges the jury that if they believe from the evidence that the plaintiff renewed the lease for said plantation in the year 1888, to the defendant for five years, beginning on the 1st day of January, 1889, at an annual rent of eleven hundred dollars, with full knowledge of the fact that said defendant had severed said trees from said plantation, and converted the same into wood, for the value of which this suit is prosecuted, and that the plaintiff thereafter permitted defendant to remain in the use and possession of said plantation to January, 1891, and accepted the payment of said annual rent from defendant for said years of 1889 and 1890, that plaintiff would be presumed to have waived the breach of said lease in the cutting of said trees, and in that event, you should render a verdict for the defendant." (9.) "The court charges the jury that the acceptance of rent by the plaintiff and the renewal of the lease for five years with full knowledge by the plaintiff that said trees had been severed by defendant from said plantation without her consent, and in violation of said lease, is presumptive evidence that the plaintiff has waived and condoned the breach of said lease; and if you believe from the evidence that she has waived or condoned said breach of said lease, then you should find a verdict for the defendant." (10.) "The court charges the jury that, if they believe from the evidence that the plaintiff can only show her right to the possession of the wood alleged to have been cut by the defendant during his actual possession of said lands, only by showing her right of entry into the possession of said lands, against the right of said defendant, in consequence of his breach of said lease, by the severance of said trees by him from said lands without authority, then and in that event, under the evidence in this case, the plaintiff can not maintain this suit, and you should therefore find a verdict for defendant." (12.) "The court charges the jury that if they believe from the evidence that the defendant in good faith cut down the trees and converted them into wood under the belief that he had a right to do so under the lease obtained by him from Sayre & Graves, the authorized agents of the plaintiff, then and in that event, if you should find a verdict for the plaintiff, you should fix the value of the wood at the place it was cut, after deducting the cost of cutting the

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same, and after deducting the expenses of hauling the same to market."

Upon the jury's return of a verdict in favor of the plaintiff, the defendant moved the court for a new trial, assigning as grounds therefor that the verdict was contrary to the evidence, that it was contrary to law, and the damages assessed were excessive; that the court erred in his instruction to the jury, and in its rulings upon the evidence. This motion was overruled, and the defendant duly excepted.

The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

RICHARDSON & REESE, for appellant.—(1.) In order for the plaintiff to maintain the present action of trover, she must show that there was a breach of the lease during the time the wood was cut, and that she then elected to declare the lease forfeited, and did declare it, so that the right of possession of the plaintiff revested in her. The acceptance of rent for the term of the lease during which the severance and conversion were made, was a waiver of all acts of forfeiture.—*Dahm v. Barlow*, 93 Ala. 120, 9 So. Rep. 598; *Taylor's Landlord & Tenant*, 497, 498; *Stuyvesant v. Davis*, 9 Paige 427; *Gamber v. Hackett*, 6 Wis. 323; 2 Herman on Estoppel and *Res Adjudicata*, 1173; *Camp v. Scott*, 47 Conn. 366; *Winterink v. Maynard*, 47 Iowa. 306. (2.) If the owner of lands is not in the actual possession, a personal action for the taking, conversion and detention of things severed from it will not lie.—*Beatty v. Brown*, 76 Ala. 267; *Cooper v. Watson*, 73 Ala. 253; *Mather v. Trinity Church*, 3 S. & R. 509; *Baker v. Howell*, 6 S. & R. 476; *Brown v. Caldwell*, 10 S. & R. 114; *Brothers v. Hurdle*, 10 Ired. 490; *Powell v. Smith*, 2 Watts, (Penn.) 126.

ARRINGTON & GRAHAM, *contra*.

McCLELLAN, J.—This case was defended below, and the rulings of the trial court are assigned as erroneous here, mainly upon the theory that a landlord can not maintain trover for timber wrongfully cut off the demised premises, sawn into fire-wood and sold by the tenant, until after the lease has been forfeited, or the tenancy has otherwise been terminated, and the landlord

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in consequence has a right to the immediate possession of the land. This contention is sought to be rested on the doctrines, perfectly well established in themselves, that *trespass* for injuries done to land by a tenant can not be maintained by the landlord while the tenancy continues, and that *trover* can not be maintained by the owner of land for timber, fixtures, gravel and the like, severed from the freehold and converted, against one who is in the *adverse* possession of the land. But neither of these principles has any bearing upon or application to the question raised in this case. Trespass will not lie against a tenant pending the term, because the wrong which is the gist of the action is an offense against the actual possession and right of possession, and these are in the tenant; and trover will not lie at the suit of the owner of land against one in adverse possession, for the conversion of things severed from the freehold, because in such case a trial of the title to the land, from which the severance has been made, would be necessary, and title to realty is beyond the issues triable in this form of action. But there is no question in this case, either as to the possession and right of possession of the land, or as to the title to the land: the recovery sought does not depend upon inquiry into these matters. The tenancy of the defendant entitled him to the possession, of course, and it is not the object of this suit, and can not be its effect, to disturb that right or its enjoyment. The tenancy of the defendant is also an unequivocal admission of the plaintiff's title to the land: the defendant, so long as he continues in possession under the lease, and his sole right to the possession is referable to the lease, can not dispute the plaintiff's title—can not set up any claim to title in himself against the plaintiff—*can not hold adversely to the plaintiff*. His possession is that of his landlord. He has contracted for the landlord's right of possession for the term of his lease. His possession of the land entitles him to the possession, of course, of all that is attached to it so as to constitute a part of the freehold—as trees—so long as they remain so attached and continue to be a part of the freehold; but he has no title to trees, and can assert no adverse claim to them against his landlord. The title to them, as to the land, remains in the landlord. When they are severed from the freehold, they cease to be a part of the

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thing leased by the tenant: they are no longer a part of the realty, but at once become personal chattels, the right to the immediate possession of which is in the landlord, because the title is in him and the right of possession of personalty is referred to the title. This, with conversion by the defendant, is all that is necessary to the maintenance of trover—the title and right to immediate possession in plaintiff to the personalty converted. To show title to the personalty in such case, involves no inquiry as to the title of the land from which the severance has been made, and no inquiry as to the right of possession of the land. The plaintiff is not required to say he had title to the land, and the defendant is not allowed to say that plaintiff had not title; that issue can not be made: the relation of landlord and tenant entirely eliminates it. Similarly, defendant's right of possession of the land is not involved; but that right of possession is confined to the land itself: it does not pertain to things which have ceased to be land, or appurtenant to land, through unauthorized and wrongful severance. The plaintiff, having title to the thing severed and the right to the immediate possession of it, may, of course, maintain trover where there has been a conversion of the thing by the defendant. These views, which lead to and result in the concrete proposition, that the action of trover will lie at the suit of a landlord against his tenant, pending the tenancy, for wood into which trees wrongfully severed from the demised premises by the tenant have been converted by him, are abundantly supported by the authorities.—2 Brick. Dig., 484, §§ 1, *et seq.*; 3 Brick. Dig., 779, §§ 1, *et seq.*; *Street v. Nelson*, 80 Ala. 230; *Mather v. Trinity Church*, 3 Ser. & Rawle, 509; s. c., 8 Am. Dec. 663, 668-9; *Harlan v. Harlan*, 15 Pa. St. 507, 513; *Anderson v. Hapler*, 34 Ill. 436; s. c., 85 Am. Dec. 318; *Truss v. Old*, 6 Randolph, 556; s. c., 18 Am. Dec. 748, 751; *Moore v. Wait*, 3 Wend. 104; s. c., 20 Am. Dec. 667; *Farrant v. Thompson*, 5 Barn. & Ald. 826; 2 Taylor, Land., & Ten., § 74; *Congregational Society v. Fleming*, 11 Iowa, 533; s. c., 79 Am. Dec. 511. And it is upon these considerations that the landlord, the owner of the land, may maintain an action on the case for waste injurious to the inheritance, or detinue or replevin for fixtures, trees, ores and the like, or debt for the statutory penalty for felling trees,

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against his tenant during the term, and without recovery of possession of the land. They are all actions which do not rest upon possession, or right to immediate possession of the land, and, being between landlord and tenant, they involve no inquiry as to title; the fact of the relation being itself determinative of that question.—*Rogers v. Brooks*, 99 Ala. 31; 11 So. Rep. 753.

The cases of *Cooper v. Watson*, 73 Ala. 252, and *Beatty v. Brown*, 76 Ala. 267, are clearly distinguishable from this one in that the defendants in those cases held *adversely* to the plaintiffs—a fact which is, as we have seen, of controlling importance—and the recoveries sought involved trials of the conflicting claims of *title*, which could not be adjudicated in these transitory actions. The case of *Little v. Allison*, 93 Ala. 150, 9 So. Rep. 388, did not involve the relation of landlord and tenant, and, perhaps, what is there said should be limited by a consideration of the fact, which does not appear as prominently in the report of the case and in the opinion as it should, that the wrong-doer was a mere naked trespasser, who set up no claim to the title or possession of the land against the trustees—though not a tenant of the plaintiffs, he still was not in the adverse possession of the premises.

The facts that plaintiff claimed a forfeiture of the lease existing at the time of the wrongful severance of the timber by the defendant, or of a lease subsequently made of the premises covering succeeding years; because of such severance, or upon any other ground; that defendant denied the forfeiture, and put plaintiff to her action of ejectment to recover the land before the last lease had expired, which action was pending and being defended by the tenant when this cause was tried, or when it was instituted, were attempted to be availed of by the defendant on the trial below of this case, as showing that defendant held the land *adversely* to plaintiff. These facts had no such tendency. They showed, indeed, that the defendant claimed the right to continue in possession, but they also showed that he based this right *on his lease from the plaintiff*—that he asserted no possession or right of possession except as plaintiff's tenant, and in full recognition of plaintiff's title. If either party was injured by the exclusion of this evidence, or by the refusal of the court to allow the defendant to file in this cause a

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plea which he had interposed in the ejectment suit, and in which he asserted his right to possession for the term of the last lease entered into between the parties under that lease and as plaintiff's tenant, it was the plaintiff. Certainly the defendant can have no ground of complaint based on the exclusion of evidence and judicial admissions of his going to show that he did not and had never claimed adversely to the plaintiff.

Of course, it was competent for plaintiff to introduce the lease which was current at the time this suit was brought, as showing that defendant's possession was under and not adverse to her title; and we can conceive of no ground for the exclusion of any part of that instrument on any idea that some of its provisions might possibly be looked to by the jury to determine what were the stipulations of a previous lease in a certain particular. Moreover, the provision which was singled out by a special motion to exclude tended to contradict the oral testimony of the defendant as to what was said in certain conversations between him and the plaintiff and her husband, acting, it is insisted by defendant, as her agent; and for this reason alone the appellant can take nothing on account of the ruling in question. What we have said covers and disposes adversely to appellant of all the rulings of the court in respect of the pleadings, on the admission of testimony, and upon charges requested and given or refused, except rulings relating to the testimony, by deposition, of the plaintiff herself, and two or three charges to be presently considered.

It is to be observed with reference to the pleadings, that so far as this opinion bears upon questions intended to be raised in that connection, it is merely incidental to the disposition of the same questions arising on the evidence and instructions to the jury; for the *record* of the trial court does not show that any pleas were filed, or that any demurrers to pleas were interposed, or that any ruling was made as to the sufficiency of pleas, or indeed any thing but the complaint, certain demurrers to the complaint, which do not appear from the *record* to have been ruled upon, and a final judgment on verdict for the plaintiff. The *bill of exceptions*, which is no part of the record below, recites certain pleas, demurrers and judgments thereon, but, as has been many times decided here, such judgments can not be presented for the considera-

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tion and revision of this court in and by a bill of exceptions.

The refusal of the court to exclude the deposition of Mrs. Rogers may be rested on the ground, among others, perhaps, that the motion to that end went to the whole deposition, and was not made before the trial was entered upon, the ground of the objection not appearing to have transpired or become known to defendant only after commencement of the trial. Code, § 2810; *Moody v. A. G. S. R. R. Co.*, 99 Ala. 553.

If that part of the testimony of Mrs. Rogers which was objected to because not responsive to the cross-interrogatories under which it was given, was in fact not responsive, the defendant was not injured by its admission, since it was competent evidence in the cause, and but the repetition of facts to which the witness had deposed in response to interrogatories in chief.

The measure of damages in this case was the value of the wood at the time of the conversion of the trees into cord-wood, with interest to the time of trial, as declared by the court in its instructions to the jury.—2 Brick. Dig., 488, §§ 67, *et seq.*; 3 Brick. Dig., 780, §§ 29, *et seq.*

The court correctly charged that the burden of showing that plaintiff had released this cause of action to defendant was upon the latter.—3. Brick. Dig., 433, § 388.

Plaintiff's acceptance of rent from the defendant, for a period subsequent to the severance and conversion of the trees, and the execution by her of a lease for a subsequent time, may have amounted to a waiver of the *forfeiture of the lease* current at the time thereof; but these facts do not operate a release of defendant's liability for the value of cord-wood made from the trees wrongfully severed by the defendant. The cause of action laid in this case is not dependent upon the waiver *vel non* of any forfeiture of the lease. Charges 8 and 9 requested for defendant were, therefore, properly refused.

Charge 12 of defendant's series was, to say the least, invasive of the province of the jury. If they had a right to measure the damages by reference to the facts hypothesized in that charge, it was a matter within their discretion to do so or not, and the court properly refused to require them to do so.

We will not extend this opinion by discussing the ap-
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plication for a new trial. It was obviously without merit, and the court committed no error in overruling it.

The judgment of the circuit court is affirmed.

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Garnishment Suit.

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101	127
119	276
101	127
128	375

1. *Ratification by corporation of acts by its promoters.*—A corporation, after its organization, has the power to accept and ratify the agreements and covenants of its promoters, made to effect or carry out the purposes of its organization, and, when accepted and ratified, such agreements and covenants are mutually binding.

2. *Issue of stock by corporation; when presumed to be legal.*—When it is shown that all the capital stock of a corporation has been subscribed and paid for in full, and there is no evidence as to the value of the consideration paid for said stock, it will be presumed that it was adequate, and a court can not declare the issue of such stock fictitious or violative of Article XIV, § 6 of the Constitution, or of section 1662 of the Code of 1886.

3. *Subscribers to corporate bonds; when not liable as stockholders.*—When stock, which has been subscribed, paid for and issued, upon adequate consideration, is by the holders thereof placed in the hands of a trustee to be paid over to subscribers for bonds of the corporation, when their subscriptions to such bonds are paid in full, such stock, so delivered to the trustee, may be transferred by him to the subscribers for bonds, upon payment of their subscriptions, without contravening the Constitution and statutes of the State, (Const. Art. XIV, § 6; Code, § 1662); and the failure to pay their subscriptions for the bonds, does not make such subscribers for said bonds liable upon the stock agreed to be delivered, as upon unpaid subscription for stock.

4. *Subscribers to bonds of a corporation; liable as garnisheers.*—Where the contract of subscription to bonds of a corporation provides that upon the payment of the entire amount of the subscription an equal amount of fully paid-up stock of the corporation shall be paid over to the holders of the bonds, and that the subscription is to be paid in monthly instalments of fixed sums, a subscriber to the bonds under such contract, who has paid three instalments, is a debtor to the corporation for the balance due upon his subscription, in such sort as to be subject to process of garnishment by creditors of the corporation, and liable as garnishee to the extent of such balance due and unpaid upon his subscription for the bonds.

* This case has been overlooked in reporting the former volumes of the Alabama Reports.

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APPEAL from the City Court of Montgomery.

Tried before the Hon. T. M. ARRINGTON.

The appellants recovered a judgment against the Montgomery Furnace & Chemical Company, on which a garnishment was duly issued and served upon W. F. Joseph. Joseph, the garnishee, had previously subscribed for one thousand dollars of the first mortgage bonds to be issued by the defendant. The provisions of the contract of subscription for said bonds are sufficiently stated in the opinion; and it is the alleged indebtedness due upon this contract of subscription to said bonds, which is sought to be subjected in the present case to the claim of the plaintiffs. The other facts are sufficiently stated in the opinion.

TOMPKINS & TROY, for appellants.—1. Under the garnishee's contract of subscription, he was liable to the creditors of the defendant company, and the fact that he violated the law in his contract, can not shield him from liability to the creditors of the corporation.—2 *Morawetz on Corp.*, §§ 824-5; *Morrow v. Nashville &c. Co.*, 10 Am. St. Rep. 658. 2. If the defenses interposed by the garnishee were available to him at any time, he should have claimed them before the corporation became insolvent. *Marshall Foundry Co. v. Killian*, 6 Amer. St. Rep. 539; *Beck v. Henderson*, 76 Ga. 380. 3. Where a subscription is obtained by fraud, the subscriber is estopped from setting this up against a creditor of the corporation, where he has not been diligent in discovering the fraud, or in having his subscription cancelled on discovery of the fraud.—*Upton v. Tribilcock*, 91 U. S. 45; *Thompson on Liability of Stock*, § 142 *et seq.* *Cook on Stock*, §§ 163, 210, note 4. 4. A subscriber is estopped, by the subscription of his name in the corporation books, to set up that the corporation, when his subscription was made, had no stock to offer.—*Lathrop v. Kneeland*, 4 Barb. 432. 5. Acts that estop the subscribers as against the corporation, estop them as to corporation creditors.—*Griswold v. Seligman*, 72 Mo. 110.

JONES & FALKNER, *contra*.

COLEMAN, J.—Appellants, having recovered a judgment against the defendant corporation, upon the return

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of execution indorsed "No property found," sued out writ of garnishment against W. F. Joseph. The answer of garnishee, denying indebtedness, was contested, and upon the evidence to sustain the contest the court directed the jury to find the issue in favor of the garnishee. This charge of the court is assigned as error. The recovery of the judgment, the issue of execution as above stated, and the corporate character of the defendant in execution is admitted. The evidence consists of the testimony of Woolfolk, secretary and treasurer of the defendant corporation, and Exhibits 1, 2, 3. Exhibit No. 3 is a contract or agreement signed by the "Montgomery Land and Improvement Company," and the "Standard Charcoal Iron & Chemical Company," and was made in promotion of the general purpose for which the defendant corporation was intended. The testimony of Woolfolk, in connection with Exhibits 1 and 2, show that the terms and stipulations contained in the agreement evidenced by Exhibit 3 substantially were accepted and ratified by the defendant corporation. A corporation after its organization, has the power to accept and ratify the agreement and covenant of its promoters, made to effect and carry out the purposes of its organization, and, when accepted and ratified, the covenants are mutually binding.—*Wood v. Whelen*, 93 Ill. 155; *Reichwald v. Hotel Co.*, 106 Ill. 439; 4 Amer. & Eng. Enc. Law, 202; *Canal Co. v. Vallette*, 21 How. 419; *Moore & H. Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 6 So. Rep. 41; *Cook on Stocks*, § 707, and note to text.

It is contended that the obligation or subscription of Joseph was in violation of Article XIV, § 6, of the constitution, and Code, § 1662; and under these provisions of the law, as construed in *Williams v. Evans*, 87 Ala. 726, 6 South. Rep. 702; *Tutwiler v. Coal, etc. Co.*, 89 Ala. 399, 7 South. Rep. 398, the subscription is null and void. The word "bonds," as used in the constitution, is omitted from section 1662 of the Code, but the same principles of law apply in either case. If the Montgomery Furnace & Chemical Company was organized with a capital stock of \$400,000, each share of the par value of \$100, whether of this amount the Montgomery Land & Improvement Company subscribed and received 100 shares or 300 shares, and the Standard Charcoal, Iron & Chemical Company subscribed for and received 3,900

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shares, or 3,691, and 9 shares were subscribed for by other parties in cash, is immaterial upon the question now considered. The evidence shows that all the capital stock of the defendant corporation was subscribed for and paid up in full; that of the Montgomery Land & Improvement Company by a conveyance of property consisting of 30 acres of land, and that of the Standard Charcoal, Iron & Chemical Company by the issue of a license to operate under the H. M. Pierce patents to the extent of 60,000 cords of wood *per annum*; and in consideration of these payments the certificates of stock were issued to them respectively. There is no evidence in the record to show or tending to show either the value of the 30 acres of land or of the Pierce patents, conveyed in payment of the stock; and in the absence of all proof as to the value of the consideration, the court can not say the issue of the stock was fictitious, or in violation of the constitution or section 1662. The stock having been paid for in full, and lawfully issued to the subscribers, they had the right to sell or donate the same, and such sale or gift did not impose any liability upon the grantee or donee.—*Railroad v. Dow*, 120 U. S. 299; 7 Sup. Ct. Rep. 482. "Where stock has been issued to a patentee for the use of his patent he may donate and return a part of this stock back to the corporation, to be sold at a reduced price for the benefit of the corporation, and the transaction will be upheld whether the stock was placed in the hands of a trustee or not."—Cook on Stocks, §§ 42, 43, and note; *Otter v. Petroleum Co.*, 50 Barb. 247. To carry out the purposes for which the Montgomery Furnace & Chemical Company was organized it was necessary to raise a large amount of money, and to effect this it was agreed to "negotiate by subscription, at par, one hundred and seventy-five thousand dollars of first-mortgage bonds," "all of which subscriptions for bonds were to be paid for when called, provided said calls do not exceed ten *per cent. per month*. The Standard Charcoal, Iron & Chemical Company, and the Montgomery Land & Improvement Company, of the shares of stock owned and held by them placed in the hands of a trustee some \$200,000, "who was authorized and empowered to issue to each of the subscribers of the first-mortgage bonds above provided for a corresponding amount of stock." The subscription contract of the

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garnishee, by which he obligated himself to pay for and take one thousand dollars of first-mortgage bonds, provides "that the entire issue of bonds shall not exceed two hundred thousand dollars; that they were to be a first lien upon all the property, rights and franchises of the Montgomery Furnace & Chemical Company; that, upon the payment of the entire amount of any subscription, an equal amount of fully paid-up capital stock shall be issued to the holder." The subscriptions were to be paid in monthly instalments of 10 *per cent.* each. The stock intended for the subscribers to the bonds having been paid for in full by the original subscribers for the stock, and by them placed in the hands of a trustee for the benefit of the corporation, and to be paid over to the subscribers for the bonds when their subscriptions for bonds were paid in full, a failure to pay such subscription for the bonds did not make the subscriber for the bonds liable as for an unpaid subscription for stock. If the capital stock of the company had not been paid for and issued, but remained in the corporation to be issued, and then had been issued as a bonus by the corporation to subscribers for the first-mortgage bonds, or if the bonds were to be or had been issued as a bonus by the corporation to subscribers for the capital stock, in either case, that issued as a bonus would be regarded as a fictitious issue, and in violation of Article XIV, § 6, of the constitution, 87 Ala., 6 South. Rep., and 89 Ala., 7 South. Rep., *supra*. But where, as in this case, according to the evidence, the stock had been fully paid for, and issued, upon a sufficient and adequate consideration, to the subscribers, such holders had the right to return the stock to the company, or to a trustee for the benefit of the company, to be sold or donated, as might be directed by the owner of the stock, without contravening the constitution and laws of the State.—*Christensen v. Eno*, 106 N. Y. 97, 12 N. E. Rep. 648; *Cook on Stocks*, § 42, and note; *Morrow v. Steel Co.*, (Tenn.) 10 S. W. Rep. 495. It follows from the foregoing principles that the garnishment suit cannot be maintained against Joseph by reason of any supposed statutory liability as a stockholder for any supposed balance due upon subscription for stock.

The sole question, then, is, did Joseph's subscription for \$1,000 of first-mortgage bonds create such an obliga-

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tion as would give the Montgomery Furnace and Chemical Company the right to coerce payment by a suit at law, and create an indebtedness subject to process of garnishment for any balance due upon his subscription for bonds. *Prima facie*, we hold the corporation had the power to issue the first-mortgage bonds.—*Alabama Gold Life Ins. Co. v. Central A. & M. Ass'n.*, 54 Ala. 73; *Canal Co. v. Vallette*, 21 How. 414; *England v. Dearborn*, 141 Mass. 590, 6 N. E. Rep. 837; 4 Amer. & Eng. Enc. Law, 222, 236, 245. The evidence shows there had been three calls made in pursuance of the provisions of the subscription agreement for the bonds, and three payments made of 10 *per cent.*, each, for the amount of his subscription, leaving a balance due from the garnishee, Joseph, of \$700. The obligation to pay for the bonds and to issue the bonds and stock, when paid for, is mutually binding, and may be enforced by either party.—*Anson on Cont.*, *73, and note; 1 *Parsons on Cont.*, *453; 1 *Wharton on Cont.*, § 528, and note; 10 S. W. Rep. *supra*. The first instalment of 10 *per cent.* on the subscription was due within 30 days after organization of the company, and the remaining assessments of 10 *per cent. per month* were payable thereafter upon calls or assessments to be made as the work progressed. The amounts to be paid on the several assessments are as fixed and as certain as if separate notes had been given for such assessments, or as if the liability was for subscriptions to stock payable in instalments. Such a fixed and definite liability may be reached and subjected to process of garnishment.—*Ruse v. Bromberg*, 88 Ala. 627, 7 So. Rep. 384. The garnishee may have a defense to the payment of his subscription for the bonds, but such defense, if any exist, is not disclosed in the record. The jury might have inferred from the evidence that there had been assessments and calls on Joseph for his unpaid subscription, consequently the affirmative charge ought not to have been given.

Reversed and remanded.

CLOPTON, J., not sitting.

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Austin et al. v. Bean, Executor, et al.*Bill in Equity to Foreclose a Mortgage.*101 133
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1. *Partition of lands; no equities involved.*—In a proceeding for the partition of lands, as provided by our statutory system, (Code, §§ 3237-3262), the consideration and adjustment of equities between the joint owners is not involved; and a decree of the probate court granting partition settles, in no wise, any of the equities subsisting in favor of the several owners upon, or in respect of, the common property.

2. *Same; co-tenant not estopped thereby from asserting equities against existing mortgage.*—When there exists a mortgage on joint property to secure a debt of one of the co-tenants, a partition of the common property by decree of the probate court does not estop the other co-tenants from asserting their equity to have the share allotted to their joint owner sold first to pay such debt, in exoneration of the shares allotted to them.

3. *Same; co-tenant not estopped from asserting equity by exchange of her share by warranty deed.*—The fact that one of the joint owners of common property, immediately after the partition of said lands by decree of the probate court, conveyed the share allotted to her by warranty deed, in exchange for the share of one of her co-tenants, does not estop her from the assertion of her equity to have the share so exchanged sold first, to satisfy a mortgage existing upon the whole property, given to secure a debt of her said co-tenant, the mortgage having been executed prior to the acquisition of title by the co-tenants.

4. *Purchaser from an heir; charged with notice of equity in favor of other heirs.*—The purchaser of land from one who derives title by descent from his father, is charged with notice of any equity existing in favor of the ancestor, or the co-heirs of the grantor, affecting the land in its descent.

5. *Mortgage by joint owner after partition does not destroy equity in favor of his co-tenants.*—When, after the partition of lands, the title to which was acquired by descent, one of the heirs mortgages the share allotted to him, his mortgagees are charged with notice of equities existing in favor of the other heirs, to have the mortgagor's share applied first, in exoneration of the shares of his co-heirs, to the satisfaction of a prior mortgage executed by their ancestor on the common property for the benefit of such heir and mortgagor.

6. *Testimony as to statement made by deceased; competency of witnesses interested in the suit.*—The exception as to competency of witnesses, provided by statute (Acts 1890-91, p. 557), being for the protection of the estate of the deceased and those claiming under him, when

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the estate of the deceased person is interested in the result of a proceeding, the adversary of said estate can not object to the competency of witnesses called by the representatives of the deceased in such proceedings, to prove transactions with or statements by the deceased, on the ground that the witnesses are heirs of the deceased and directly interested in the result of the suit.

7. *Parties to a suit; a non compos mentis a ward of the court.*—When a *non compos mentis* is a party to a suit, he will be treated as the ward of the court, so far as is necessary for the court to see that his rights are properly asserted and protected; and for this purpose a guardian *ad litem*, appointed to represent his interest, is under the direct control of the court.

APPEAL from the City Court of Decatur.

Heard before the Hon. W. H. SIMPSON.

The original bill in this case was filed on February 12, 1891, to foreclose a mortgage, executed by V. L. Austin and wife, Elizabeth Austin, to John D. Rather on February 12, 1884, and which mortgage was transferred by said Rather to B. F. Bean on March 26, 1885. The said transferee, B. F. Bean, died, and the executor of his last will and testament, L. G. Bean, is the complainant in the present suit. The said V. L. Austin and Elizabeth Austin died before the present bill was filed, and left surviving them as heirs-at-law William H. Austin, Mollie Roper, *nee* Austin, and Taylor Austin, a *non compos mentis*.

The facts in the case are sufficiently stated in the opinion. There were objections by the Armitage-Herschell Co. to that portion of the testimony of William H. Austin, Charles Austin and Mrs. Roper to the effect that the money borrowed from Rather, to secure the payment of which the mortgage was executed, was for the use and benefit of William H. Austin. The grounds of these objections were, that it was shown, on cross-examination, that the witnesses' source of knowledge was from hearsay, and because such testimony was in reference to a transaction with or statement by a deceased person, whose estate is the subject matter of the suit, and the witnesses are parties thereto and interested therein. These objections were sustained in the final decree of the chancellor.

On the final submission of the cause, upon the pleadings and proof, the chancellor decreed that the complainant in the original bill was entitled to the relief prayed

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for, and that the Armitage-Herschell Company, under the prayer for general relief in its cross-bill, was entitled to have all the lands described in the mortgage of Bean to Rather "sold for the satisfaction of the mortgage of the complainant, L. G. Bean, executor, and to have the sale of each share made separately, and to have each share contribute equally to the payment of the price and paramount charges on the land, to-wit, the Bean mortgage and the costs of the suit; and further, to have the remainder of the said three shares paid over to the parties entitled, to-wit, Mollie Roper, Taylor Austin and said Armitage-Herschell Company."

The chancellor also declared that if any latent equity existed in favor of Mollie Roper, Taylor Austin and Charles Austin, at the death of their father, as set up in the cross-bill filed by them, it was "cut off by the partition proceedings in the probate court to which they were parties, and by the conveyance of Mollie Roper to William H. Austin, all of which made them warrantors of each other," and, therefore, decreed that the cross-bill filed by them be dismissed.

This appeal is prosecuted by Mollie Roper, Taylor Austin and Charles Austin, who assign as error the final decree of the chancellor granting the complainant the relief prayed for in the original bill, dismissing appellant's cross-bill, and in not ordering the lands of William H. Austin sold for the payment of the mortgage before subjecting the lands of appellants to sale, and also in holding that William H. Austin, Mollie Roper and Taylor Austin were not competent to testify as to the purposes for which the mortgage from Virgil Austin to Rather was made.

BRICKELL, SEMPLE & GUNTER, for appellants.—(1.) W. H. Austin, Charles Austin and Mollie Roper were competent witnesses to testify as to the making of the mortgage by Virgil Austin to secure a debt for W. H. Austin.—Code, § 2765, Acts 1890-91, p. 557; *Kumpe v. Coons*, 63 Ala. 448. (2.) Mollie Roper and Taylor Austin had the right to require W. H. Austin's share of the land to be applied first to the payment of the mortgage debt of Rather. (3.) Subrogation and marshalling are founded on the same principles; the latter being resorted to prior to sales, the former after sales, to effect the same

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result, viz., the proper application of property to the discharge of debts so as to work out equitable results as between persons having claims against different parcels of property or standing in a different relation to the same debt.—*Cheeseborough v. Millard*, 7 Am. Dec. 494; *Aldrich v. Cooper*, 2 Lead. Cases in Eq. (Title “Marshalling,”) pp. 262–318. (4.) Wherever, as between two parties who personally are bound, or whose property is bound for debt, the liability of one is primary and the other secondary, the right of subrogation and marshalling exists.—*Redington v. Cornwall*, 90 Cal. 49; *Aldrich v. Cooper*, 2 Lead. Cases in Eq., (Title “Marshalling and Subrogation”), p. 292; *Wilkes v. Harper*, 2 Barb. Ch. Rep. 338; Harris on Subrogation, 181, 184. (5.) The right to marshal securities as to the debtor is absolute, if no injustice is done, and so it is as to the creditor. It is clear that no damage can be done to the creditor, for all the land is to be sold for his debt, there is no diminution of his security, but only the order of sale is directed. And as to the debtor, W. H. Austin, he can not complain, since all that is asked is that his own property shall be applied to pay his debt to the relief of his surety's property.—*Twombly v. Cassidy*, 82 N. Y. 155; *Cole v. Malcolm*, 66 N. Y. 363; *Dickson v. Chorn*, 71 Am. Dec. 382; 14 Amer. & Eng. Encyc., 702–3–4; *Cherry v. Monroe*, 2 Barb. Ch. (N. Y.) 618. (6.) The right to require the property primarily liable for a debt to be applied for the relief of property not so liable, applies to persons taking by descent or devise as well as by purchase.—2 Lead. Cases in Eq., 242, 292; Harris on Subrogation, 97; *Rodman v. Burroughs*, 63 N. C. 242. (7.) And property mortgaged stands as a surety, if a person agreeing to pay under such circumstances would be a surety. And a person entitled to the property, though not liable for the debt, has the rights of a surety with respect to the debt. *Lidderdale v. Robinson*, 2 Brock. 159; 77 Amer. Dec. 490; *Bull v. Coe*, 11 Am. State Rep. 240–242; *Dering v. Earl of W.*, 1 Lead. Cases in Eq. 149–150; *Reddington v. Cornwall*, 90 Cal. 49; *Price v. Reed*, 15 N. E. Rep. 754; *Cherry v. Monroe*, 2 Barb. Ch. (N. Y.) 618; *Twombly v. Cassidy*, 82 N. Y. 155; *Cole v. Malcolm*, 66 N. Y. 363. (8.) The equities of Taylor Austin and Mollie Roper were not involved and could not be adjusted in a partition proceeding in the probate court. The partition did

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not affect the mortgage of Rather, except to make it, as between the several owners of the land which had been divided, to rest in equity, primarily on the principal debtor, W. H. Austin, as before it rested on his undivided interest. The object and effect of partition is only to sever the joint possession, transferring to each owner's share the equities resting on it before division.—5 Wait's Act. & Def. 87; *Westervelt v. Haff*, 2 Sandf. Ch. (N. Y.) 98; *Re Howe*, 1 Paige 125; *Freeman on Co-ten. & Par.*, §§415, 478; *Barrington v. Clarke*, 21 Am. Dec. 432; *Staples v. Bradley*, 60 Amer. Dec. 630. (9.) The mortgage executed by W. H. Austin on his own share after the partition and conveyance to him by Mollie Roper gave to his mortgagee no right superior to that possessed by W. H. Austin. The mortgage recited that there was a prior mortgage on his land to secure a debt owing by his ancestor and himself; and the possession of the owners of the other lands included in the Rather mortgage was notice to W. H. Austin's mortgagee of their equity to hold the same against any right of W. H. Austin, or person claiming under him, to sell their land for any purpose, and of the right of the possessors to equities against the world.—*Ellis v. Tousley*, 1 Paige 280; *Clidewell v. Spaugh*, 26 Ind. 323; *Moore v. Pierson*, 71 Amer. Dec. 409 and note; *Bryan v. Raimivez*, 68 Am. Dec. 340 and note; *Wyatt v. Elam*, 68 Amer. Dec. 518. (10.) The mortgagee of W. H. Austin did not obtain a legal title to the land owned by him. The legal title was in Rather, the first mortgagee. There can be no such thing as a *bona fide* purchaser without the legal title.—*Chiles v. Boon*, 10 Pet. 177; *Wilson v. Holt*, 83 Ala. 528, 3 So. Rep. 321; 2 Story's Eq., 1502; *Cole v. Malcolm*, 66 N. Y. 363; 2 Jones on Mortgages, §1202; *Robeson's Appeal*, 117 Pa. St. 628; 14 Amer. & Eng. Encyc. of Law, 686; *Woollen v. Hillen*, 52 Amer. Dec. 693; 2 Story's Eq., 1373; 14 Amer. & Eng. Encyc. of Law, 702-4; *Twombly v. Cassidy*, 82 N. Y. 155.

ON APPLICATION FOR REHEARING.

(1.) The execution of the warranty deeds by Mrs. Roper and W. H. Austin in exchange of the shares allotted to them, respectively, did not destroy the equity existing in Mrs Roper, to have the share conveyed to W.

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H. Austin sold first, in payment of the mortgage debt made for W. H. Austin's benefit.—*Sewell v. Henry*, 9 Ala. 24; *Gaffney v. Hicks*, 124 Mass. 303; *White v. Brokaw*, 14 Ohio St. 339; 2 Devlin on Deeds, §845; *Leach v. Leach*, 58 Amer. Dec. 645. (2.) The exchange operated merely as partition does as to personal obligations resting upon either of the parties remaining, and, as to the land, would be transferred to the part acquired by the party owing the debt or resting under the obligation.—*Rawle on Covenants for Title*, 406 and note; *Rector v. Waugh*, 17 Mo. 13; *Dawson v. Lawrence*, 42 Amer. Dec. 210; *Harrison v. Ray*, 108 N. C. 215, 23 Am. St. Rep. 57. (3.) The covenant of Mrs. Roper in her warranty deed to W. H. Austin can not be considered to embrace an incumbrance which the said Austin had agreed to discharge, and which could not have been asserted against the land had it continued to be hers, and which becomes a charge on the land conveyed by her alone by the default of W. H. Austin.—*Fitch v. Baldwin*, 17 John. 165; *Watts v. Welman*, 2 N. H. 460; *Furness v. Williams*, 11 Ill. 240; *Silverman v. Loomis*, 104 Ill. 137; *Smith v. Camell*, 32 Me. 123; *Brown v. Stapels*, 28 Me. 497.

E. W. GODBEY, *contra*.—(1.) The partition proceedings concluded every right any of the parties thereto had in and to the lands partitioned.—*Freeman on Co-tenancy & Partition*, 531; *Reese v. Holmes*, 5 Rich. Eq. 540; *Herr v. Herr*, 5 Pa. St. 428; *Burghardt v. Van Dusen*, 4 Allen 374; *Forcroft v. Barnes*, 29 Me. 128; *Kain v. Rock River Coal Co.*, 15 Wis. 129. (2.) Those proceedings vested the title in fee simple in each of the Austin heirs, as fully and completely as if each had conveyed to the others.—*Code*, §3246. Fee simple is a pure inheritance free from conditions, and is absolute so far as it is possible for one to possess an absolute right of property in lands.—4 *Kent's Commentaries* 5; *Tiedeman on Real Property*, 23. (3.) The conveyance by Mollie Roper and husband, with full covenants of warranty, to W. H. Austin, prior to the mortgage to Armitage-Herschell Co. of the lands conveyed by that mortgage, executed by W. H. Austin, cut off and extinguished all her right and title, legal and equitable, in and to, said lands and forever estopped her.—*Barclift v. Lillie*, 82 Ala. 319; 2 So. Rep. 120; *Hargrave v. Melbourne*, 86 Ala. 270, 5 So. Rep.

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285; *Chapman v. Abraham*, 61 Ala. 108. (4.) Mollie Roper and Chas. H. Austin, being joined in the cross bill with Taylor Austin, and the two former showing no right whatever to the relief prayed in said cross bill, the same was properly dismissed, irrespective of whether the said Taylor had intrinsically any right to relief or not. All must recover, or none can.—*Hubbard v. Allen*, 59 Ala. 283, 301. (5.) The equity sought to be set up by the Austin heirs against the land mortgaged by W. H. Austin to Armitage-Herschell Co. required a cross bill and could not be asserted by answer.—*Bedell v. New Eng. Mortg. Sec. Co.*, 91 Ala. 328, 8 So. Rep. 494; *Weaver v. Brown*, 87 Ala. 537, 6 So. Rep. 354; *Whitfield v. Riddle*, 78 Ala. 99. (6.) Owen and Morgeson, as mortgagees of W. H. Austin, were *bona fide* purchasers without notice.—*Mobile Life Ins. Co v. Randall*, 71 Ala. 220; *Whelan v. McCrary*, 64 Ala. 329; *Coleman v. Smith*, 55 Ala. 376; *Rogers v. Adams*, 66 Ala. 602; *Craft v. Russell*, 67 Ala. 9. (7.) As transferee of that mortgage Armitage-Herschell Co. is entitled to the same protection against latent equities as Owen and Morgeson.—*Calahan v. Monroe, Smaltz & Co.*, 56 Ala. 303; *Horton v. Smith*, 8 Ala. 73; 2 Brick. Dig., 520, § 192. (8.) Armitage-Herschell Co., as *bona fide* purchasers of the negotiable notes executed by W. H. Austin to Owen and Morgeson, are entitled to protection against latent equities supposed to affect the mortgage security for the notes.—*Spencer v. M. & M. R. Co.*, 79 Ala. 586; *Hawley v. Bibb*, 69 Ala. 52; *Wildsmith v. Tracy*, 80 Ala. 258.

HEAD, J.—Wm. H. Austin, Taylor Austin and Mollie Roper, *nee* Austin, acquired by descent from their father, Virgil Austin, deceased, 396 acres of land, described in the bill. This land, at the death of Virgil, was encumbered by a mortgage which he had executed thereon to John D. Rather for \$1,262, which debt and mortgage, by assignment, became the property of B. F. Bean. The note which the mortgage was given to secure was executed by said Virgil and his son, the said Wm. H. Austin, so far as the note itself discloses, as principal debtors. Virgil Austin died in 1885. On the 3d day of October, 1887, Wm. H. Austin instituted proceedings in the probate court of Morgan county, wherein the lands lay, against his said brother and sister, Taylor Austin

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and Mollie Roper, for partition of the lands between himself and them under the provisions of the Code, Article 1, Chap. 17, Title 2, Part 3. The proceedings were had and conducted, in every respect, conformably to the statute, and resulted in partition, under proper decree, on the 12th day of December, 1887, the share of each being allotted and set off to him or her in severalty, of which due record appears. Immediately after this allotment, the said Wm. H. and Mollie exchanged shares, each conveying to the other, by separate deeds, with general covenants of warranty, the land which had been allotted to him or her, respectively, the husband of Mollie joining with her in her conveyance.

On the 24th day of June, 1890, the said Wm. H. Austin and wife, to secure an indebtedness of \$2,000, presently contracted, executed to Owen & Morgerson a mortgage on the lands acquired by him by exchange with his sister; which debt and mortgage were subsequently assigned for value to Armitage-Herschell Co. In March, 1889, said Mollie Roper sold to Chas. H. Austin three acres of land she had acquired by the exchange, and he went into possession of, and improved, the same.

In this status of the land, the complainant, L. G. Bean, as executor of B. F. Bean, deceased, filed this bill to foreclose the said Rather mortgage, bringing all the said interested parties before the court as defendants. Mollie Roper and husband, and Wm. H. Austin and Chas. H. Austin answered, separately, setting up that the mortgage sought to be foreclosed was executed by Virgil Austin to secure the payment of money borrowed from Rather for the exclusive use and benefit of said Wm. H. Austin, who received and used the same for his own purposes, the said Virgil becoming by the execution of the note and mortgage, in fact, merely the surety of Wm. H., who was, in fact, the principal debtor; and insisting that the land acquired by him by virtue of the allotment and exchange, aforesaid, be first sold in ease or exoneration of the portions of the land acquired by the said Mollie and Taylor Austin. Taylor Austin, being *non compos mentis*, defended by guardian *ad litem*, who, by answer, denied all the allegations of the bill. Mollie Roper, Taylor Austin, by next friend, and Chas. H. Austin, also, jointly, filed a cross-bill to marshal the assets, praying the prior sale of Wm. H. Austin's share

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of the land in exoneration of the rest. This was answered by the Armitage-Herschell Co., setting up the said partition proceedings and exchange, the execution and their acquisition of the Owen & Morgerson mortgage, denying the alleged suretyship of Virgil Austin, and insisting that they were *bona fide* purchasers, without notice of the alleged equity. They also answered the original bill; and, making their answer a cross-bill, set up the same facts, as those set up in their answer just mentioned, and prayed that the lands of Mollie Roper and Taylor Austin be first sold, in exoneration of the lands of said Wm. H., upon which they hold their mortgage. This relief, however, was denied by the chancellor, and is not insisted on, and may not be further noticed.

The controversy then is between Mollie Roper, Taylor Austin and Chas. H. Austin on the one side, and Wm. H. Austin, Owen & Morgerson and the Armitage-Herschell Co. on the other, and turns upon the equity of the cross-bill filed by the former. It appears, however, that Wm. H. Austin is friendly to the purpose of the cross bill. The sufficiency of this cross-bill was tested by demurrer interposed by the Armitage-Herschell Co., the important grounds of which are, that any equity the complainants therein may have had to marshal the assets as prayed, is cut off and barred, first by the said proceedings in partition, and secondly, by the conveyance in fee with warranty of Mollie Roper and husband to Wm. H. Austin, their mortgagor.

It is most manifest our statutory system of partition of lands between joint owners or tenants in common makes no provision for adjusting equities which may subsist in favor of the owners upon, or in respect of, the joint or common property. It is a system whose whole purpose and scope are to effect, by easy and expeditious methods, the division of the property into as many equal shares, in value, as there are owners, and the allotment of one share to each; and to convert the previously existing unity of title and possession into titles and possessions in severalty. In order to the exercise of the jurisdiction, the interest of each owner must be the same, and the partition must be made by lot. There is no intention in the statute, or jurisdiction conferred upon the probate court, to settle conflicting claims of title, whether

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legal or equitable; on the contrary it is expressly provided that no division or partition can be made under the statute, when an adverse claim or title is asserted by any one, or brought to the knowledge of the commissioners, or of the judge of probate.—Code, § 3251. The further express provision is made, that, “When there is a lien on an individual interest of any of the parties, such lien, if a partition is made, is thenceforth a charge only on the share assigned to such party.”—Code, § 3247. Beyond this, partition, under the statute, affects no lien or equity, whether existing in favor of a co-owner or third persons. Section 3246 provides, that “the partition so made vests a title in fee-simple in the person to whom the several shares are allotted, as fully and completely as if each had conveyed to the others; but if any fraud or undue influence be employed by any of the parties, to obtain an unfair partition or allotment, such partition may be annulled by the chancery court on bill filed within five years after the allotment.” It is contended that this provision visits upon the partitioners the same effect which would attach to a grantor of lands by his voluntary execution of a deed of bargain and sale to a grantee; and that as such a deed would estop the grantor from asserting any equity upon the land then existing, or which might grow out of conditions then existing, so the statute estops the partitioner from a like assertion. The argument is, that though the probate court confessedly can not take cognizance of, and settle such rights, by its decree of partition, yet a party to the proceeding, invested with such rights against his co-owner, may, by resort to equity, arrest the probate court in the exercise of its jurisdiction, have all parties in interest brought before the court of equity and partition made upon the basis of a settlement of all rights, legal and equitable, of all the parties. We do not think it is so contemplated by the statute. Limited as the jurisdiction of the probate court is in the matter of partition, and considering together the several provisions of the whole chapter upon the subject, it is clear there was no intention to enlarge the estates or interests of the several owners, when reduced to a severance of the ownership and possession, by attaching thereto such an implied warranty on the part of each owner in favor of the others as will cut off equities in favor of and against each

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other which were not and could not be drawn in question or adjudicated in that forum. The purpose of the provision relied on is to declare the same ownership in fee, in severalty, which had previously existed in unity, as concluded by the decree of the court granting partition. It is not now our purpose to inquire or decide what effect is produced by the decree of partition, by way of estoppel, upon a party to the proceeding to afterwards assert against another party a right or title of the character actually or necessarily involved in the proceeding. Ownership and actual or constructive possession of all the partitioners being essential to the jurisdiction of the probate court, it may be that partition implies, on the part of each to the other, warranty of the ownership alleged, or necessary to exist, in order to an exercise of the jurisdiction. Nor do we declare its effect upon equities where the partition is had in a forum capable of settling equities. All we decide is that adjustment of equities is not essential to that partition which the probate court is authorized to decree, and that it is the spirit of the statute that their settlement be left to other tribunals, without arresting the jurisdiction of the probate court. We do not decide that the latter course may not be pursued. Cases may arise where it is desirable to settle all matters in one proceeding, and chancery may have authority to restrain proceedings in the probate court to that end. These are questions not necessary for decision here.

It is next insisted that the warranty deed executed by Mollie Roper and her husband to Wm. H. Austin operates to estop the assertion by her of the equity she now claims, and that as she is joined in the cross-bill with Taylor Austin, who rests under no such estoppel, no relief can be granted to either.

We take the facts in reference to the execution of that deed, as they are stated, and correctly stated, in the answer and cross-bill of the Armitage Herschell Co., to the original bill, as follows, after correctly stating the probate partition proceedings: "This defendant further avers that almost immediately after the subdivision, partition and allotment hereinbefore referred to, the said Mollie Roper and the said Wm. H. Austin exchanged, each with the other, the lots and parcels of land allotted and set apart to them, respectively; the said Wm. H.

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conveying to said Mollie the parcels of land that had been allotted to him, and the said Mollie Roper, and her said husband, by fee-simple deed of general warranty of date Dec. 13, 1887, (which was recorded Feby. 3, 1888), conveying to the said Wm. H. Austin that portion of said lands which had been allotted to the said Mollie Roper, as aforesaid; and from December 13th, 1887, until now, the several parties to said partition proceedings have each been in the sole and exclusive occupancy and possession of the said several lots or parcels of land, that is to say; the said Taylor Austin has been in the sole occupancy and possession of the part and parcel of said land set apart and allotted to him by the said commissioners in said partition proceedings; and the said Mollie Roper and her husband, A. J. Roper, have been in the sole and exclusive occupancy and possession of the parts and parcels of land conveyed to the said Mollie, on December 13th, 1887, by said Wm. H. Austin; and the said Wm. H. Austin and his wife, Sue Austin, have been and are now in the sole and exclusive occupancy and possession of the parts and parcels of said land conveyed to the said Wm. H. Austin by said Mollie Roper and her husband." The partition was consummated by the commissioners, on Dec. 12th, 1887. The deed, in exchange, executed by Wm. H. Austin to Mollie Roper, contains the like covenants of warranty as those in the deed of the latter and her husband to the former. The writer was disposed to think we should seek to ascertain and give effect to the intention of the parties deducible from these facts, and that in accordance with that intention the estoppel claimed can not be invoked. It is manifest the exchange by deeds was based upon the partition just then completed by the commissioners. We have seen that the division to be made by the commissioners was one of exact equality, in value, of all the shares, without the consideration or adjustment of any equities in favor of one co-owner against another. The value of the absolute and unincumbered ownership of the share allotted to Mrs. Roper was the exact equivalent of the value of the same ownership of the share allotted to Wm. H. The exchange was of one share for the other. It would seem, therefore, that as matter of fact, the exchange was not intended to involve the settlement of any rights or equities which the partition by

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the commissioners did not, itself, involve. All the shares were incumbered by the Bean mortgage. Mrs. Roper, in form, warranted the title to the share of Wm. H. against that mortgage and all other incumbrances; but, in turn, Wm. H. likewise, simultaneously, warranted the title to the share of Mrs. Roper. What then was the intention of the parties? The writer was inclined to think their only purpose was to release each to the other the same interest and estate held by them in their respective shares at the completion of the allotment and no other; that the covenants, in so far as the equities of the parties not involved in the adjudication in partition are concerned, set-off and annulled each other. To enforce the letter of the covenants would require, that if Wm. H. were evicted and his estate destroyed by the Bean mortgage, Mrs. Roper should answer therefor; if Mrs. Roper were evicted and her estate destroyed by the same mortgage, Wm. H. should answer therefor; and if both suffered a like fate, each should answer to the other—a virtual set-off of demands.

In *Dawson v. Lawrence*, 13 Ohio 543, (42 Am. Dec. 210), two co-tenants, Smith and Houston, effected partition by mutual deeds of bargain, sale and release, each purporting to be for a consideration in money. Subsequently, it was ascertained that the title of Houston was worthless. In the meantime, both Smith and Houston had conveyed their interests acquired by virtue of the partition. This partition having been declared void because one of the parties to it had no title, a question arose in regard to the relative claims and rights of the grantees of Houston and the grantees of Smith. The grantees of Houston insisted that the deeds referred to did not operate as a "simple extinguishment of interest, like a deed of partition, or a mere release, but a positive, affirmative conveyance, by which Smith sold a part of his land to Houston, and Houston sold a part of his land to Smith; so that each purchaser from Houston may trace a part of his title to Smith, and each purchaser from Smith can trace a part of his title to Houston; and, consequently, the condition of each purchaser, deriving his title from the same source, is equally meritorious." But to this argument the Supreme Court replied as follows: "We can not admit this to be the true nature of the transaction. The parties did not in-

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tend to acquire new rights, but to regulate the manner in which subsisting rights were to be enjoyed. Smith did not contemplate acquiring any title from Houston, nor to communicate any of his own, nor to share with Houston, nor with Houston's grantees, the benefit of warranties from his own grantors. But a simple partition by release was all the parties meant, as specified in the recital, and no one is liable to be misled by the nominal money consideration, or by the use of the words 'bargain and sale' in this connection. The parties to these deeds lost nothing and acquired nothing, except defined boundaries to the land which they had previously held in common. The purchasers from Houston, therefore, are not authorized to rely upon this act as any thing except a partition—defining boundaries, but conferring no title. They derive from Houston alone, and must be content with rights subordinate to such equities as the purchasers from Smith may exact.—Freeman on Co-ten. & Part., § 409."

But upon full consideration, we hold that the deed of Mrs. Roper to Wm. H. Austin must be construed according to its legal effect apparent upon its face; and, so holding, that its effect is to estop her from asserting any equity then existing in her favor in or upon the lands therein conveyed. As to her, therefore, there is no equity in the cross-bill in which she is complainant. But as to Taylor Austin there is no such estoppel. We will speak further on of his rights in the premises.

Owen & Morgerson and their assignee, Armitage-Herschell Co., are not entitled to protection against the asserted equity upon the ground that they are *bona fide* purchasers without notice. All the title their mortgagor, Wm. H. Austin, had was derived by descent from his father; and a purchaser from him is charged with notice of any equity in favor of the ancestor or heirs affecting the land in its descent. To illustrate: Suppose advancements had been made by the ancestor to Wm. H. Austin, of which these parties had no notice, it would not be contended, in such case, that a sale by him of his interest in the inheritance, to one for value, without notice of the advancements, would affect the right of the other heirs to have an account of such advancements in diminution or extinguishment of his interest in the inheritance. So, also, if he were indebted to the ancestor his

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interest in the land would descend to him charged with such indebtedness; which charge would prevail against any purchaser from him, with or without notice. The principle is the same here. If the equity asserted were one existing against the ancestor in favor of a third person; or if created by Wm. H. Austin after the descent of the land to him, a different question would be presented. In such case, Owen & Morgerson and their assignee, purchasing for value without notice, would be protected. But as it is, knowing, or being bound to know, their mortgagor's title to have been acquired by descent, they were bound to inquire and learn his relations to the land, in respect of charges in behalf of the estate of the ancestor or other heirs. It matters not how obscure the equity was, the lands descended affected by the infirmity it created, as against all the world.

It is very clear that Wm. H. Austin, Chas. Austin and Mrs. Roper were competent witnesses to prove that the money borrowed of Rather, was for the use and accommodation of Wm. H. Austin, and the offers and promises of Wm. H. to repay it. If the estate of Virgil Austin is "interested in the result of the suit," within the meaning of the statute, Session Acts 1890-91, p. 557, these witnesses are called to testify by the only representatives of that estate in the present controversy. As we have seen, the sole controversy is between the complainants in the cross-bill, who are representing the ancestor in the effort to enforce the asserted equity, on the one side, and Wm. H. Austin and the Armitage-Herschell Co., and Owen & Morgerson, his mortgagees, on the other. The exception as to competency mentioned in the statute is for the protection of the estate of the deceased and those claiming under him, and does not contemplate that the adversary of the estate, in a suit or proceeding, may object to the competency of witnesses called by the representatives of the deceased in such suit or proceeding to prove transactions with or statements made by him.

We have said that Mrs. Roper estopped herself by her deed from asserting the equity she now claims, but that Taylor Austin is not estopped. They both joined as complainants in the cross-bill, hence no relief could be granted, under that bill, to either. But, Taylor Austin is *non compos mentis*, and will be treated as a ward of the

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court. It is the duty of the court to see that his rights are properly asserted and protected. For that purpose the guardian *ad litem* is under the control of the court. The city court should not have dismissed the ward without seeing that his rights were properly asserted. It should have directed the guardian *ad litem* to file a separate cross-bill in behalf of the ward, so that the assertion of his rights would not be clogged with infirmities which attached to the claims and demands of others. We will reverse the decree, and here direct the guardian *ad litem* to file such a cross-bill, unless by the consent of Mrs. Roper and Chas. H. Austin, that already on file be amended by striking them out as parties complainant, in which event relief may be granted Taylor Austin upon that bill.

The decree of the city court is reversed, with directions to the guardian *ad litem* as above stated, and the cause remanded for further proceedings. The city court can so mould its final decree when rendered, that the equity to marshal the assets be enforced in behalf of Taylor Austin, without granting any such relief to Mrs. Roper or Chas. H. Austin.

Reversed and remanded.

ON REHEARING. Announced Aug. 9, 1894.

HEAD, J.—Upon consideration of the exhaustive argument of counsel in support of the application for a rehearing in this cause, we feel constrained to recede from the conclusion announced in our former opinion as to the effect of Mrs. Roper's deed to Wm. H. Austin, as an estoppel upon her to assert the equity she seeks to enforce, and to adopt the first impressions of the writer of that opinion, as therein expressed. The reasoning and authorities set forth in the printed argument for a rehearing are conclusive to our minds. The former decree will be set aside, and a decree here rendered reversing the decree of the city court and remanding the cause, with directions to the city court to grant the complainant in the original bill and the complainants in the cross-bill of Mrs. Roper and others, the appropriate relief therein prayed.

Reversed and remanded.

BRICKELL, C. J. not sitting.

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Birmingham Mineral Railroad Co. v. Jacobs.

Action against a Railroad Company for Damages, by Administratrix of Deceased Employé.

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1. *Engineer's right to presume compliance with the statute by the employés of an intersecting road.*—An engineer when approaching a crossing has a right to presume that the employés upon a train on an intersecting road will comply with the statute, and stop their train within one hundred feet of the crossing; and when, in an action against a railroad for the killing of an engineer on an intersecting road caused by a collision at the crossing, it is shown that the employés upon the defendant's train, when approaching the crossing, failed to stop within the distance required by law, it will be presumed, without further evidence, that the injury was caused by the negligence of the defendant.

2. *Duty of engineer when approaching a railroad crossing.*—Although the engineer on an engine of a railroad having the older right of way can presume, when approaching a crossing, that the employés of a train on the intersecting road will stop their train as required by law, it is his duty to keep a lookout for approaching trains; and if, in the face of facts reasonably indicating that the approaching train on the intersecting road is not going to stop at said crossing, the engineer attempts to cross, he is chargeable with negligence.

3. *Question of negligence submitted to the jury.*—In an action against a railroad to recover damages for injuries alleged to have been sustained, by reason of negligence, the questions, whether the damage complained of was occasioned entirely by the negligence of the defendant or its employés, or whether the plaintiff by his own negligence so far contributed to his own misfortune, that but for such contributory negligence on his part the injury complained of would not have been inflicted, are for the determination of the jury under proper instructions from the court.

4. *Charge making ignorance of the law an excuse for its violation properly refused.*—In an action against a railroad for the alleged negligent killing of plaintiff's intestate by a collision between the defendant's train and an engine on the dummy line upon which the intestate was the engineer, a charge which asserts that, "if the jury find for the plaintiff, in assessing the damages as a punishment to the defendant, they might look to the fact that at the time of the alleged injury, the law was in some doubt as to whether a dummy railroad was a railroad within the meaning of the statute, requiring the stoppage of

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trains within 100 feet of the crossing of a railroad," is properly refused; the charge making the defendant's employes' alleged ignorance of the law an excuse for its violation.

5. *Charges to the jury.*—In an action to recover damages against a railroad, where the plaintiff counts upon the alleged negligence of the defendant's "engineer, conductor, servants or agents," in charge of the train, an instruction that the jury "can not find from the evidence that the engineer in charge of the engine propelling defendant's freight train was guilty of negligence," is properly refused, since, if the engineer was not negligent, other employes on the defendant's train, upon whom rested duties, might have been negligent, and because the question of negligence was one for the jury.

6. *Misleading charges.*—In an action against a railroad for injuries resulting from a collision of one of defendant's freight trains with a passenger train on a dummy line, at their point of intersection, a charge to the jury, "that the engineer in charge of the engine propelling the passenger train, should exercise more care than the engineer in charge of the engine propelling the freight train," is properly refused, as being calculated to mislead the jury, and as asserting a principle, which if ever true, had no application to the case at bar.

7. *Charges properly refused when disregarding positive statutory requirements.*—In an action against a railroad to recover damages, caused by a collision at the intersection of defendant's road with a dummy line, an instruction that if "at the time defendant's said servants failed to stop said train they did not know, and had no good reason to believe, that the dummy train was about to cross defendant's track, then the failure to make such a stop would not be negligence on the part of the defendant's employes," is properly refused, since it ignores the positive requirements of the statute.

8. *Charge to the jury; properly refused when misleading.*—In an action against a railroad company to recover damages for the alleged negligence of "its engineer, conductor, servants and agents," in charge of one of its trains, an instruction to the jury, that "the only negligence for which the plaintiff can recover under the evidence in this case is the negligence of the conductor in not stopping defendant's train before reaching the crossing," is properly refused, as being calculated to mislead the jury, and as taking from them the consideration of the negligence of defendant's other employes.

APPEAL from the Circuit Court of Jefferson.

Tried before the HON. JAMES B. HEAD.

This was an action on the case, brought by the appellee, Hannah Jacobs, as the administratrix of the estate of Peter Jacobs, deceased, against the Birmingham Mineral Railroad Company, and sought to recover damages for the alleged wrongful and negligent killing of plaintiff's intestate. The death of the plaintiff's intestate re-

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sulted from a collision of one of the defendant's freight trains with an engine and train of the Ensley Railway, which was a dummy line, at the point of intersection of the defendant's road with the Ensley Railway; the plaintiff's intestate being the engineer on the dummy engine. The negligence complained of is alleged as follows in the third count of the complaint: "That defendant, through its engineer, conductor, servants and agents aforesaid so in charge of defendant's said engine and train, negligently and carelessly failed to cause its said engine and train to come to a full stop within one hundred feet of the said crossing, and negligently proceeded before they knew the way to be clear. And defendant, through its servants and agents, negligently and carelessly managed, run and operated said engine and train; negligently run said train toward and to said crossing at a high rate of speed, and negligently run said train backward towards and to said crossing, and negligently run said train towards and to said crossing without keeping a proper lookout; by reason of which said negligence and carelessness of defendant, its said train ran against the said engine and train upon which plaintiff was as aforesaid, in consequence of which plaintiff's intestate was so injured that he died." The other facts of the case as disclosed on this appeal, are sufficiently stated in the opinion.

Among the written charges requested by the defendant, and to the refusal to give each of which the defendant separately excepted, were the following: (5.) "If you believe the evidence, the defendant's train was approaching the dummy track in plain view of the first railroad crossing reached by the dummy train, when the dummy engine was on such crossing." (6.) "If you believe the evidence, the defendant's train was approaching the dummy track in plain view of the first railroad crossing reached by the dummy train, when the dummy engine was on such crossing, and there is no evidence tending to show that defendant's train at such time and from such place was hid by the banks of any cut or other obstruction." (7.) "If you believe the evidence, there was nothing to prevent the plaintiff's intestate from seeing the defendant's approaching train when the dummy engine was on the railroad crossing first reached by it." (8.) "If the jury find for the plaintiff, in assessing the damages as a punishment to

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defendant, they may look to the fact that at the time of the alleged injury, the law was in some doubt as to whether the Ensley Dummy road was a railroad within the meaning of the statute requiring the stoppage of trains within one hundred feet of the crossing of a railroad." (12.) "You can not find from the evidence that the engineer in charge of the engine propelling the defendant's freight train was guilty of negligence." (16.) "I charge you, gentlemen of the jury, that an engineer in charge of an engine propelling a passenger train, should exercise more care than an engineer in charge of an engine propelling a freight train." (19.) "I charge you, gentlemen of the jury, that if you shall believe from the evidence that the defendant's servants managing and controlling defendant's train failed to stop defendant's train within one hundred feet of the crossing of the dummy track, and if you shall further believe from the evidence that at the time defendant's servants failed to stop said train they did not know and had no good reason to believe that the dummy train was about to cross defendant's track, then the failure to make such a stop would not be negligence on the part of defendant's employes." (20.) "It was the duty of the plaintiff's intestate to know that the way across defendant's track was clear, or to look up and down defendant's track to see if a train was approaching thereon, before he attempted to cross the same with his dummy engine and train, and if the jury believe from the evidence that by looking up and down defendant's track, he could have seen the approach of defendant's train in time to have avoided the injury, then you must find for the defendant." (21.) "If the jury believe from the evidence that plaintiff's intestate could have seen defendant's train approaching the crossing in time to have avoided the injury by looking, and that he omitted to look, or looking saw defendant's train approaching the crossing and near thereto, and he undertook to cross his dummy engine across in front of such approaching train of defendant, he was guilty of such negligence as will preclude recovery in this action." (22.) "Although the jury may believe from the evidence that the servants and agents of defendant neglected to use due care and diligence to avoid the collision, this did not relieve the plaintiff's intestate from the necessity of taking due

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care and precaution for his safety. Before attempting to cross the railroad track of defendant with his dummy engine and train, plaintiff's intestate was bound to use his senses to look and to listen for an approaching train on defendant's track in order to avoid a collision in this case. If he omitted to use his senses of sight and hearing, and propelled his dummy engine thoughtlessly on the track of defendant's railroad, or, if using them, he saw or heard the approaching train of defendant on the track, and instead of waiting for it to pass, he undertook to cross the track of defendant's railroad with his dummy engine and train in front of defendant's approaching train and was injured thereby, he so far contributed to the injury complained of in this complaint as to deprive the plaintiff of any right of recovery." (23.) "The only negligence for which the plaintiff can recover, under the evidence in this case, is the negligence of the conductor in not stopping defendant's freight train before crossing the dummy track, if the jury believe, from the evidence, that said freight train did not stop for such crossing." (27.) "The court charges the jury that an engineer pulling a passenger train with passengers aboard his train, who sees a freight train approaching the crossing of his railroad and another railroad, and said freight train, when so seen, is near enough to collide with the passenger train, unless such freight train should be brought to a stop, provided the passenger train should proceed to cross in front of the approaching freight, the said passenger train should not attempt to cross before such approaching freight train, and if the engineer of such passenger train should so attempt to cross and should be injured and killed thereby, then I charge you that in such case, there could be no recovery by the administrator of such engineer, unless the injury was inflicted willfully, wantonly or recklessly." (29.) "If the jury believe from the evidence in this case that the plaintiff's intestate could have discovered the approach of defendant's train by the exercise of ordinary care, such as an ordinarily prudent man would have exercised under like circumstances, in time to have avoided the alleged injury, they must find for the defendant." (30.) "It was the duty of plaintiff's intestate to have kept a vigilant lookout for an approaching train on defendant's

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track, and if the jury believe from the evidence that plaintiff's intestate could have seen the approach of defendant's train by the exercise of ordinary care and diligence, such as an ordinarily prudent man would have exercised, under like circumstances, in time to have avoided the alleged injury, they must find for the defendant." (31.) "If the jury believe from the evidence that the plaintiff's intestate could have seen the approach of defendant's train by looking, in time to have avoided the injury, and that he failed to look, or looking, saw the train approaching, and he undertook to pass over in front of defendant's train, they must find for the defendant." (32.) "If the jury believe from the evidence in this case, that plaintiff's intestate could have discovered the approach of defendant's train by the exercise of ordinary care, such as an ordinarily prudent man would have exercised under like circumstances, in time to have avoided the alleged injury, they must find for the defendant." (33.) "If the jury believe from the evidence that plaintiff's intestate could have seen the approach of defendant's train by looking, in time to have avoided the injury, and that he failed to look, or looking saw the train approaching, and he undertook to pass over in front of the defendant's train, they must find for the defendant." (38.) "If the jury believe from the evidence that plaintiff's intestate could have seen defendant's train approaching the crossing in time to have avoided the injury by looking, and that he omitted to look, or looking saw defendant's train approaching the crossing and near thereto, and he undertook to cross his dummy engine across in front of such approaching train of defendant, he was guilty of such negligence as will preclude a recovery in this action." (39.) "It was the duty of plaintiff's intestate to have kept a vigilant lookout for an approaching train on defendant's track, and if the jury believe from the evidence that plaintiff's intestate could have seen the approach of defendant's train by the exercise of ordinary care and diligence, such as an ordinarily prudent man would have exercised under like circumstances, in time to have avoided the alleged injury, they must find for the defendant." (40.) "It was the duty of plaintiff's intestate to know that the way across defendant's track was clear, or to look up and down defendant's track to see if a train was approaching thereon,

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before he attempted to cross the same with his dummy engine and train, and if the jury believe from the evidence, that by looking up and down defendant's track, he could have seen the approach of defendant's train in time to have avoided the injury, then you must find for the defendant."

There was judgment for the plaintiff, assessing his damages at \$10,000. The defendant appeals, and assigns as error the several rulings of the trial court, to which exceptions were reserved.

HEWITT, WALKER & PORTER, for appellant.—1. If the train of the defendant was in dangerous proximity to the dummy crossing, and there was nothing to indicate that it was going to stop for said crossing, the plaintiff's intestate ought not to have acted on the presumption that the defendant's train was going to stop for said crossing. The law required of him care and caution, to guard and provide against possible carelessness of others.—*L. & N. R. R. Co. v. Webb*, 90 Ala. 185, 8 So. Rep. 518; *Bellefontaine Railway Co. v. Snyder*, 24 Ohio St. 677; *Zimmerman v. Railroad Co.*, 71 Mo. 481. 2. The 5th charge requested by the defendant should have been given.—*Ivey v. Phefer*, 11 Ala. 535; *Brandon v. Snows*, 2 Stewart 255; *Williams v. Shackelford*, 16 Ala. 318; *Henderson v. Mabry*, 13 Ala. 713; *Nelson v. Williams*, 18 Ala. 650.

BOWMAN & HARSH, *contra*.—(1.) The plaintiff's intestate had the right to rely upon the presumption that defendant's train would stop before crossing the dummy line, until he was put upon notice, actual or constructive, that it would not do so.—*Strong v. R. R. Co.*, 8 Amer. & Eng. R. R. Cases, p. 273; *Newson v. N. Y. C. R. R. Co.*, 29 N. Y. 383; *Massoth Case*, 64 N. Y. 532; *L. & N. R. R. Co. v. Black*, 89 Ala. 313; 8 So. Rep. 246; *Hart v. Dereroux*, 41 Ohio St. 565; *Fennel v. Garner*, 1 Cr. & M. 21; *Lucks v. Chicago R. R. Co.*, 19 Amer. & Eng. R. R. Cas. 305; *Davis v. N. Y. C. R. R. Co.*, 47 N. Y. 400; *Mackey v. N. Y. C. R. R. Co.*, 35 N. Y. 75; *Beems v. Chicago R. R. Co.*, 58 Iowa 150; *Steele v. Central R. R. of Iowa*, 43 Iowa 109. (2.) Charges 5, 6 and 7 were properly refused.—*Marx v. Bell*, 48 Ala. 497. (3.) The other charges refused by the court should not

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have been given.—*Birmingham Min. R. R. Co. v. Jacobs*, 92 Ala. 187, 9 So. Rep. 320; *Ensley R. Co. v. Chewning*, 93 Ala. 24, 9 So. Rep. 458; *Cobb v. Malone*, 92 Ala. 630, 9 So. Rep. 738; *Sedgwick on Damages* (8th Ed.), §§ 1320, 1321; *Katzenberger, Receiver v. Laws*, Sup. Ct. Tenn., Spring Term, 1891; *A. G. S. R. R. Co. v. Hill*, 93 Ala. 514; 9 So. Rep. 722.

HARALSON, J.—In this case, on a former appeal, (92 Ala. 187), it was held, under the same state of facts, that the testimony did not tend to show that the collision was willfully caused by defendant's servants, but that the trend of the whole testimony repelled such an inference. It was also held, that the second count did not charge willful negligence. The third count charges no more than mere negligence against the defendant. The pleas were "not guilty" and contributory negligence on the part of the plaintiff's intestate.

The fact that the defendant's train was not stopped, in compliance with the statute, within one hundred feet of the railroad crossing, and was run in the manner and at the rate of speed charged in the third count, is negligence for which the railroad company is liable. The proof tends to establish the truth of this count; and the case has been tried mainly, if not altogether, on the plea of contributory negligence.

The statute regulating the duties of railroads, when tracks cross each other, is: "When the tracks of two railroads cross each other, engineers and conductors must cause the trains of which they are in charge to come to a full stop, within a hundred feet of such crossing, and not proceed until they know the way to be clear; the train on the older railroad having the right of way being entitled to cross first."—Code, § 1145.

The defendant's railroad and the Georgia Pacific track ran parallel, and fifty-six feet apart at this crossing, intersected by the Ensley Dummy Railway; and the Kansas City, Memphis & Birmingham Railroad ran diagonally across both these tracks, three hundred and twenty-five feet from the crossing of the defendant and Ensley Railway tracks, forming with the Georgia Pacific and Kansas City, Memphis & Birmingham Railway and the Ensley Railway, an area in the shape of a triangle, with the defendant's railroad running across the open

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end of the triangle, fifty-six feet from and parallel, as above stated, to the first named railroad. This area, as the evidence tended to show, was open, with nothing to obstruct the view, except a few scattering pine trees. It is three hundred and twenty or twenty-five feet, from the crossing, south, to the Kansas City, Memphis & Birmingham railroad, where it crosses the defendant's track; and, commencing a few feet south of the K. C., M. & B. road, there runs a cut, from five to seven and one-half feet deep. The evidence shows, that at the time the Ensley dummy approached the Georgia Pacific road, there was a freight train on the latter road, completely blocking it up, and obscuring the sight of the crossing below and the triangular area formed by said railroads, described above. At that time, the defendant's freight train, composed of fourteen cars, including the caboose, had stopped eight hundred and sixty-five feet from the Ensley crossing, and beyond the K. C., M. & B. road, with its rear end, at which there was a caboose car, towards the crossing when the accident happened. It used the signal bell, as the evidence tends to show, and backed towards the crossing, having attained a speed of from 4 to 12 miles an hour, as variously stated by different witnesses, at the time it reached the crossing. Just at that moment, the Ensley dummy engine had reached and was upon the crossing, and its engine and the caboose of the defendant's train collided, killing the engineer of the Ensley dummy, the plaintiff's intestate. The evidence tends to show, that the train of the defendant, from the time it commenced to back towards the crossing and until the collision occurred, never halted. It was argued, that the train on the Georgia Pacific road, at the time the dummy engine approached and stopped within ten or fifteen feet of it, and the deep cut above referred to, in which the defendant's train had stopped, shut out the sight of the defendant's train from the dummy engine, and *vice versa*, so that their respective engineers and servants did not see each other, thereby causing them to be unmindful, each, of the approach of the other. We have no evidence whether the engineer on the dummy saw the defendant's approaching train or not, further than that his engine was afterwards found to be reversed, and other persons on the dummy cars, as wit-

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nesses, swear they saw the defendant's approaching train, and the passengers got off in consequence. The conductor on the dummy swears he saw the approach of the other train, when it was seventy-five feet from the crossing.

I. The plaintiff's intestate had a right to rely upon the performance by those on the defendant's train, in charge of it, of every act imposed by law on them, when approaching the crossing. The presumption was, that they would stop within a hundred feet of the crossing, as the statute required them to do. It can not be imputed as negligence to him, that he did not anticipate culpable negligence on the part of the employés of defendant. One, in the position of this engineer, called upon to exercise care to avoid danger from the acts of others, might, in regulating his own conduct, have regard to the probable or apprehended conduct of such other persons, and to the presumption that they would act with reasonable caution and not with culpable negligence. And it has been held, that one approaching a railroad crossing in a city is not bound to be on the alert for danger, when he has the assurance given, in the failure of the company to give the statutory signals, that the crossing is safe.—*Beiseigel v. The N. Y. C. R. R. Co.*, 34 N. Y. 622; *Strong v. Placerville R. R. Co.*, 8 Am. & Eng. R. R. Cases, 274; *Bower v. Chicago, M. & St. L. R. R. Co.*, 19 Am. & Eng. R. R. Cases, 301. Without more than that the defendant's servants failed to bring their train to a stop, within the distance required by law, it will be presumed the injury was caused by the negligence of defendant.—*Sherman on Contributory Negligence*, § 469; *Huckshoed v. St. Louis &c. R. R. Co.*, 90 Mo. 548; *Beiseigel v. N. Y. C. R. R. Co.*, 34 N. Y. 622.

II. But, on the other hand, all the authorities, so far as we have seen, agree, and it certainly accords with sound principle, that it was the duty of the deceased, before he undertook to cross the track of the defendant, to look out for approaching trains, and the manner and speed with which they might come. This was his duty, notwithstanding his train had the right of way by law, and it was culpable negligence in the defendant's employés not to accord it to him, and he might presume they would not violate their legal obligation. He had no right to close his eyes to the approaching train, if he

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was in a position to see. In the absence of all apparent danger, the deceased would not be negligent in crossing defendant's track. He was not authorized, however, to indulge a presumption that the other company would comply with the law, in the face of facts reasonably indicating that they would not. That presumption authorized him to proceed with his train up to the danger line, which no prudent person, in the exercise of that degree of caution for his own and the safety of others entrusted to him, should cross, without being chargeable with negligence. That line lay just where a person occupying his position, observing the prudence he ought to have observed, could reasonably see that the defendant's employes were not going to make the stop. The presumption, which the law authorized him to indulge, that they would comply with the law gave way, and no longer existed, if, and when, it became reasonably apparent that they did not intend to stop. The highest degree of care, was upon him just there, without reference to the carelessness of the defendant's agents. In such an emergency, it is not enough that the chances are equally balanced; nice calculations should not be made. The decided weight of probability should be against the chances of a collision. The contention on the part of appellant, that it was his duty to stop his train when it *did not* appear the other would stop, or *without knowing* it would do so, in the absence of the dangerous proximity of the other, sets aside the presumption that the law authorized him to indulge, that the defendant would not be guilty of the culpable negligence of violating the law. It asserts the doctrine, that it was his duty to presume the other would not do its duty, while the law is, he had the right to presume it would.—*Bellefontaine Railway Co. v. Snyder*, 24 Ohio St. 676; *Meek v. Penn. Co.*, 38 Ohio St. 682; *Belton v. Barter*, 54 N. Y. 245; *Wendell v. N. Y. C. R. R. Co.*, 91 N. Y. 420; *Strong v. Placerville R. R. Co.*, 8 Am. & Eng. R. R. Cases, 274; *Pierce on Railroads*, pp. 343, 345-6.

III. That there was carelessness somewhere is evidenced by the fact, that two trains, running in the day time in nearly an open country, on two tracks, at right angles to each other, should have collided. If the deceased was negligent, we are not permitted to compare

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his with defendant's negligence, or to set-off the one against the other, or find against the guiltiest, but the enquiry is,—the defendant's guilt being admitted,—was the deceased guilty of any negligence which contributed proximately to his injury?

We stated in the *S. & N. A. R. R. Co. v. Schaufler*, 75 Ala. 141, that the proper enquiries were: (1), Whether the damage complained of was occasioned entirely by the negligence or wrongful act of the defendant or its servants; or, (2), whether the plaintiff, by his own negligence, or want of ordinary care and prudence, so far contributed to his own misfortune, that, but for such contributory negligence on his part, the misfortune complained of, as the basis of the action, would not have happened.—2 *Sherman & Redfield on Negligence*, § 467. These are matters for the determination of the jury, under the evidence in the case.

The court, at the instance of the defendant, gave the following charges to the jury, which stated the law as favorably for defendant as could be: (A.) "Though the law requires engineers and others running trains to stop their trains within one hundred feet of railroad crossings, yet an engineer, who sees another train approaching said crossing under such circumstances as would indicate to a reasonable man that such approaching train was not going to stop for the crossing, should not attempt to cross in front of such moving or approaching train, although he may have complied with the law in stopping for the crossing; and if he attempts to do so and is injured thereby, he would be guilty of such negligence as would preclude a recovery by him for such injury." (B.) "If the jury believe from the evidence that plaintiff's intestate could have avoided the alleged injury by the exercise of extraordinary care and diligence, then plaintiff can not recover in this action." (C.) "I charge you, gentlemen of the jury, that the law required of the plaintiff's intestate the exercise of extraordinary diligence in the management and control of the dummy engine."

Applying the principles stated in this opinion to the charges requested by defendant and refused, we hold, that all of them which we do not specifically notice, were contrary to the principles we have announced above, as touching the presumption the law authorized the engineer

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of the dummy line to indulge, that the persons in control of the defendant's train would do their duty; and thus, plainly, or in forms more or less subtle, seek to put the responsibility on him, *if it did not appear, or he did not know* that the other train would stop, and they are subject, for the most part, to the objection of being misleading and confusing.

Nos. 25, 26, 35 and 37 were passed on, on the other appeal, and are not insisted on now. Nos. 24 and 36 are general charges, on the effect of the evidence, and were properly refused. Charges 5, 6 and 7 were properly refused, since they ignore the presumption the law authorized the dummy engineer to indulge, that defendant's train would obey the law, and they were, besides, calculated to confuse and mislead. The refusal to give them is justified on these grounds. Charge 8 was bad in that it makes defendant's employés' alleged ignorance of law an excuse for its violation.

No. 12 was properly refused. If it were admitted that the engineer was not guilty of negligence, others of the employés, on whom rested duties, might have been. Besides, we must presume he knew the road, the distance between the crossings, the length of his train, the speed it was moving, and that it was not going to stop, so far as he was concerned; and whether he was guilty of negligence or not, under these circumstances, was a question for the jury. No. 16 was calculated to mislead and confuse the jury, and the principle it asserts, if ever true, has no application to this case, and cases of this character. No. 19 was an incorrect charge, in that it ignores and altogether disregards, as a duty to be observed by the defendant train, the positive requirement of the statute, for it to come to a stop within 100 feet of the crossing of two railroad tracks.

No. 23 was calculated to confuse and mislead the jury, and took from them the consideration of the negligence, if it existed, of the other employés of the company. Besides, it does not follow, that because the negligence of the conductor was the only negligence which entitled the plaintiff to recover, that she is not entitled to recover at all. Charges 20, 21, 22, 27, 29, 30, 31, 32, 33, 38, 39 and 40 each ignored the presumption the dummy engineer was authorized to indulge, as to the other train complying with the law, in giving his train, having the

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older right of way, the right to cross first, and of itself coming to a full stop before attempting to cross, and in that they are each confusing and calculated to mislead, being too indefinite as to the proximity of the approaching train, its speed, and in their hypothesis of danger.

There were other assignments of error on account of the admission of evidence against defendant's objection, but they seem to be without merit, are not insisted on in argument, and are, therefore, waived.

Affirmed.

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Action on Promissory Note.

1. *Note executed on Sunday.*—A note executed on Sunday can not be the subject of a recovery.

2. *Action on a note; burden of proving its true date.*—In an action on a note dated on Sunday, the presumption is that the note bears its true date, and the burden is upon the plaintiff to overcome such presumption, by proving that it was executed on a day that was not Sunday.

3. *Evidence; proof of handwriting in a note.*—In an action by a bank on a note dated on Sunday, payable to the bank, testimony that the body of the note sued on was in the handwriting of the bank's cashier, who was not in its employ until after the date of the note, is admissible as tending to prove that the note did not bear its true date.

4. *Same; admissibility of bank book.*—In an action by a bank on a note dated on Sunday, a book of the bank in which the number, name of the maker, date of execution, amount and date of maturity of all notes discounted by the bank are kept, is not admissible in evidence to show that the note sued on was a renewal of another note, which matured on Sunday, and that the renewal note was executed on a day that was not Sunday, but was dated back to the maturity of the old note according to the custom of the bank.

5. *Contracts violative of the constitution and laws.*—All contracts hostile to or violative of the state constitution and laws, or offensive of the public policy of the United States, are invalid and can not be made the basis of a recovery in any suit.

APPEAL from the District Court of Lauderdale.

Tried before the Hon. W. P. CHITWOOD.

This was an action brought by J. C. Goodloe, as re-
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ceiver of the Florence National Bank, against J. A. Hauerwas, Louis Levin and Osworth Breuss; and was founded on a promissory note.

The defendants, by special plea, set up the defense that the plaintiff was a banker doing business in the State of Alabama, and that it discounted said note at a greater rate of interest than 8 *per cent.* in violation of the penal statutes of Alabama. To this special plea the plaintiff demurred on the ground that the plaintiff was a national bank organized under the federal statutes, and governed by the federal laws, and that said penal statute was not applicable to its contracts, and did not invalidate them. The court sustained the demurrer, and defendant excepted. Defendants also, as a further defense, pleaded that the note sued on was made on Sunday. Upon this plea plaintiff joined issue.

The plaintiff introduced the note in evidence, which was signed by the defendants, and in connection therewith a book, regularly used in the business of the bank, known as the "discount register," and in which register the number, name of maker, date of execution, amount and date of maturity of all the notes discounted by the bank were entered. This book showed that the note sued on was a renewal of a note which matured on March 15, 1891, (Sunday), and was executed on March 27, 1891. S. D. Rice was introduced as a witness, and testified that he was in the employ of the bank at the time the note was renewed; that the book was correctly kept; and that it was the custom of the bank in renewing notes, if the renewal was not made on the same day the old note matured, to date the new note back to the date of the maturity of the old note. The defendants objected to the introduction in evidence of the "discount register," on the ground that it failed to show any connection between the note in suit and said book. The court overruled this objection, allowed the discount register to be introduced in evidence, and the defendants duly excepted. It was further proved, against the objection and exception of defendants, that the body of the note was in the handwriting of one Tice, who was the cashier of the plaintiff, and that on March 15, 1891, said Tice was not in the employ of the bank, and did not come to the bank until the 19th of March, 1891, and that the note in suit was not made until March 27, 1891.

The defendants introduced no testimony, but after the introduction of all the testimony for the plaintiff, they asked the following written charges, and separately excepted to the court's refusal to give each of them as asked: (1.) "If the jury believe the evidence they must find for the defendants." (2.) "If the jury believe that the note sued on was made on Sunday, then they must find for the defendants." (3.) "If the plaintiff has failed to prove to you that the note in suit was not delivered on the day it bears date, then your verdict must be for the defendants." (4.) "Unless you believe from the testimony, that the note in suit was not made and delivered to plaintiff on the 27th day of March, 1891, then your verdict must be for the defendants."

There was judgment for the plaintiff. The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

NATHAN PARKINS, for appellant.

C. E. JORDAN, *contra*.—Parol evidence is admissible to show, that a note bearing a certain date was, in fact, executed on another date.—*Burns & Co. v. Moore & McGee*, 76 Ala. 339. A note takes effect as a contract, not from the day of its date, but from the date of its delivery.—*Burns & Co. v. Moore & McGee*, *supra*; *Flanagan v. Meyer & Co.*, 41 Ala. 132. A note which falls due on Sunday, and is renewed on a subsequent week day, but dated back on Sunday of maturity, being delivered on a week day, and taking effect only from delivery, is valid.—*Aldridge v. Branch Bank at Decatur*, 17 Ala. 45. The books of a bank are competent evidence in its behalf, on proof of the entries by the clerk who made them, or if he be dead, or inaccessible, then by his handwriting.—*Morse on Banks & Banking*, (2d. Ed.) p. 62; *Union Bank v. Knapp*, 15 Amer. Dec. 181 and note; *Reynolds v. Sumner*, 9 Amer. St. Rep. 523; *Odell v. Culbert*, 42 Amer. Dec. 523.

STONE, C. J.—The note sued on is copied in the bill of exceptions. It is dated March 15, 1891, which was a Sunday. The presumption is that it bears its true date; and the burden of overcoming that presumption rests on him who asserts the contrary. In other words, it was on the plaintiff to prove that it was executed on a day which

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was not Sunday.—*Dodson v. Harris*, 10 Ala. 566 ; *Aldridge v. Br. Bank*, 17 Ala. 45 ; *Burns v. Moore*, 76 Ala. 339. If executed on Sunday it could not be the subject of a recovery.

As a general rule witnesses can only testify to facts within their knowledge. They can not testify to their belief that a fact exists. This rule has exceptions, but there was no question in this case which brought it within any of the exceptions. There was no error in receiving testimony that the body of the note sued on was in Tice's handwriting, and that he, Tice, did not become an employé of the bank until after March 15, 1891. This tended to prove the note did not bear its true date. There was no authority for introducing the bank book in evidence.

All contracts hostile to, or violative of the constitution or laws, or offensive to the public policy of the United States, are invalid, and a recovery can not be had upon them.—3 Brick. Dig. 145, § 61.

There were several errors committed in the trial of this case. We need not specify them. The principles declared above will be a sufficient guide for another trial.

Reversed and remanded.

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Action to recover Damages for Malicious Prosecution.

1. *Admissibility of secondary evidence of contents of affidavit and warrant of arrest.*—When there is evidence that, after an arrest was made, the sheriff enclosed the affidavit and warrant in an envelope, which he sealed, addressed and mailed, secondary evidence of the contents of such affidavit and warrant is admissible, although it was not shown to whom the envelope was addressed, and although the magistrate before whom the affidavit was made and by whom the warrant was issued, testified that he had been unable to find them after making diligent search in his office, and he had never received them from the sheriff ; it being the sheriff's duty to deliver the papers to the magistrate issuing them and to whom they were returnable, it will be presumed, in absence of evidence to the contrary, that he performed his duty and addressed the envelope to the proper officer.

2. *Evidence; admissibility of telegrams, and of statements by the defen-*

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dant.—In an action for malicious prosecution, telegrams by plaintiff's employers to defendant, to induce him to abandon the prosecution, and declarations by defendant on being shown the telegrams, that he would not withdraw the criminal proceedings, that he wanted the warrant executed, that plaintiff was a thief, and he would not dismiss the prosecution, are admissible as tending to show the zeal and motive of the defendant in the prosecution.

3. *Irrelevant evidence; number of persons present when plaintiff arrested*.—In an action for malicious prosecution, evidence as to the number of persons present when the officer went to arrest the plaintiff is irrelevant and inadmissible, the defendant not being responsible for any abuse in the manner of making the arrest, which was not directed by, participated in, or subsequently approved by him.

4. *Malicious prosecution; advice of magistrate issuing warrant as a defense*.—In an action for malicious prosecution, the fact that the defendant in instituting the prosecution acted under the advice of the magistrate issuing the warrant, who was also a practising attorney, does not constitute a valid defense. (COLEMAN, J., dissenting.)

5. *Charge as to the assessment of damages; when erroneous*.—In an action for malicious prosecution, an instruction to the jury that, if the prosecution was instituted maliciously and without probable cause, the jury might find for the plaintiff, and assess damages in such an amount as they determined the plaintiff was entitled to, without direction as to the elements of damages or the principles by which the jury's discretion should be governed, is erroneous and should not be given.

6. *General affirmative charge*.—In an action for malicious prosecution against two defendants, where the evidence is conflicting as to the liability against one of them, the general affirmative charge for the defendants is properly refused, although a similar charge, applicable to the other defendant, might have been correct.

7. *Charge to the jury; right of defendant to dismiss prosecution*.—In an action for malicious prosecution, where the evidence shows that the defendant refused to withdraw the prosecution, a charge to the jury that defendant had no authority to dismiss the prosecution is abstract and erroneous, since the prosecutor could have dismissed the prosecution by permission of the court.

8. *Liability of one partner for the arrest of a person by his co-partner*.—One partner is not liable for the arrest or prosecution of another person by his co-partner, on a charge of larceny of partnership property, unless he advises or directs it, or participates therein, and he is then liable only in his individual capacity.

APPEAL from the Anniston City Court.

Tried before the Hon. B. F. CASSADY.

This was an action brought by the appellee, Effie Hastings, against H. C. Marks & Co., a partnership composed of H. C. Marks and Sol Edel; and sought to

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recover from the defendants as a firm and as individuals damages for maliciously, and without probable cause, causing the plaintiff to be arrested under a warrant charging her with larceny.

The principal facts of the case and most of the rulings of the court upon the evidence are sufficiently stated in the opinion.

Upon the examination of J. F. Creen, who was the notary public and *ex-officio* justice of the peace who issued the warrant and before whom the plaintiff was tried and acquitted, he testified, among other things, "that he had no recollection of advising a prosecution against Miss Hastings, or of advising Mr. Edel that such a prosecution could be maintained on the facts related to, and in his hearing by him, before the affidavit was made for her arrest. That he never advised Edel at all as an attorney, but the facts were related to him as a magistrate."

F. H. Lyde, a witness in behalf of the plaintiff, testified that he was the deputy sheriff of Jefferson county who made the arrest of the plaintiff. The plaintiff's counsel then asked the witness: "How many persons were present when the arrest was made?" The defendants objected to this question, and duly excepted to the court's overruling their objection. A similar question was asked A. Hirsch, who testified that he was present when the plaintiff was arrested, and the defendants again excepted to the court's overruling their objection to the question. Upon the further examination of said Hirsch, in whose employ the plaintiff was at the time of her arrest, he was shown a telegram of which the following is a copy: "Mr. Sol Edel, care H. C. Marks & Co., Anniston, Ala. Please withdraw by wire prosecution of Miss Hastings. We become responsible for four dollars and costs. Answer. Hirsch Dry Goods & Mill'y Co." He was then asked whether or not he sent the original of such telegram to Sol Edel. Defendants objected to this question on the ground that the evidence sought to be elicited was irrelevant, and that it was not shown that the telegram ever reached Sol Edel. The court overruled this objection, and defendants duly excepted. Upon the witness answering that it was a copy of the original telegram sent by him to said Edel, he was asked, "If he got any reply from the telegram?" The defendants objected to this question on the same grounds, and duly

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excepted to the court's overruling their objection. On the examination of one Ullman as a witness for the plaintiff, he testified that he received from Mr. Hirsch a telegram of which the following is a copy: "To Leon Ullman. Sol Edel is prosecuting a young lady for four dollars for larceny. Prevail upon him to abandon the prosecution and telegraph sheriff here. Telegraph me result immediately. August Hirsch." This witness testified that he showed this telegram to Sol Edel, and that "Sol Edel told him, after he had shown him the telegram, that he, Edel, had positive proof that Effie Hastings was a thief or a d—d thief, he could not say positively which, and that he would not dismiss the prosecution." The defendants moved the court to exclude this testimony of the witness Ullman as to Edel's declarations, on the grounds that it was irrelevant, and duly excepted to the court's overruling their motion. Sol Edel, one of the defendants, testified in his own behalf that after stating the facts of the case to Mr. J. F. Creen, "I asked Mr. Creen if he thought I had sufficient ground to have Miss Hastings arrested for larceny of the jacket. Mr. Creen replied that he thought I had sufficient grounds, and I then made an affidavit for her arrest," before Mr. Creen. This witness also testified that Ullman showed him the telegram, and that he refused to dismiss the prosecution. It was also in evidence that H. C. Marks of the firm of H. C. Marks & Co. had nothing to do with the prosecution, and was at the time in South Carolina.

At the request of the plaintiff the court gave the following written charges to the jury: (1.) "If you believe from the evidence that Judge Creen did not advise the prosecution, then the advice of Creen will not avail the defendants to justify the prosecution." (2.) "Malice may be inferred from the want of probable cause for setting the prosecution on foot, and if you find from the testimony that in this case there was no probable cause for believing that the plaintiff was guilty of larceny when the prosecution, and that the prosecution, was instituted and conducted by defendants, causelessly and maliciously, then the jury may find for the plaintiff and assess her damages in such an amount as you determine she is entitled to." The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of

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the following charges requested by them: (1.) "If the jury believed the evidence they must find for the defendants." (2.) "The court charges the jury that Sol Edel had no power or authority to dismiss the prosecution against Miss Hastings after it had been commenced." (3.) "If the jury believe from the evidence that Edel acted in good faith in making said affidavit, after a full and fair statement of the facts to Mr. Creen, and that Mr. Creen advised such course, then they must find for the defendants."

There was judgment for the plaintiff, and the judgment entry recites "that the plaintiff have and recover of the defendants the sum of \$5,500, together with the costs in this behalf expended, for which let execution issue."

After the rendition of the judgment, the defendants moved the court to set aside the judgment and grant them a new trial on the grounds, *first*, that there was no evidence in the cause tending to show that H. C. Marks had any connection with the prosecution; and, *second*, that the verdict of the jury is contrary to the weight of the evidence. H. C. Marks, one of the defendants, also separately moved the court to set aside the judgment as to him and to grant him a new trial as there was no evidence tending to connect him with the prosecution. The court overruled each of these motions, and the defendants and H. C. Marks separately excepted to the overruling of said motions by the court.

The defendants appeal, and assign as error the several rulings of the trial court to which exceptions were reserved.

KELLY & SMITH, and J. J. WILLETT, for appellants.—One partner is not liable in an action for malicious prosecution for the arrest of a person by his co-partner, on a charge of larceny from the firm, unless he advised or participated in the arrest.—*Gilbert v. Emmons*, 89 Amer. Dec. 412; 1 Lindley on Partnership, § 300; *Arbuckle v. Taylor*, 3 Dowling's Rep. 160. The court erred in refusing to give each of the written charges requested. The advice of Creen was sufficient to justify Edel in instituting the prosecution. He was both a lawyer and a justice.—*Schippel v. Norton*, 16 Pac. Rep. 804; *McCre v. R. R. Co.*, 33 N. W. Rep. 334. The court erred

in its written charge as to the measure of damages. The charge instructed the jury to give plaintiff such damages as you determine she is entitled to. They were made by that instruction a law unto themselves, freed from all restraints to assess damages at their own will and pleasure. The charge was erroneous.—2 Greenleaf on Evidence, § 253; *True v. Plumley*, 36 Maine 482; *Rose v. Story*, 1 Pa. St. 190; *Howard v. Taylor*, 90 Ala. 241, 8 So. Rep. 36.

KNOX & BOWIE, *contra*.—(1.) The proof of loss of affidavit and bond charging Effie Hastings with larceny is sufficient.—1 Wharton on Evidence, §§ 147, 148; *Potts v. Coleman*, 86 Ala. 94, 5 So. Rep. 780; *Baucum v. George*, 65 Ala. 259. (2.) All the testimony shedding any light upon the conduct of Edel in the prosecution, his manner and the interest that he manifested, and the words that he used, are competent under the decision of this court in the case of *Motes v. Bates*, 74 Ala. 374. (3.) H. C. Marks is liable as well as Edel, for he was a member of the firm of H. C. Marks & Co., and the rule is that a firm is liable if a criminal prosecution is necessary in the interest of the firm by one of the partners, and the other partners knowing of the prosecution do not dissent, or upon knowing of the prosecution acquiesce or approve, though they may not take any part in it. The relation of partners in matters of contract is that principally of agent.—Bishop on Contracts, §§ 692–696; 1 Bates on Partnership, §§ 461, 428, 466; 1 Lindley on Partnership, B. 2, C. 1; 4 Amer. & Eng. Encyc. of Law, 39. (4.) The relation of partners is different from that of stockholders in a corporation, where the liability is limited to an interest in the company. When a suit is brought against the partnership in the firm name, an execution issued on a judgment can only reach partnership assets. It is different where the suit is against the firm, and service of process is made against each individual member. In such cases, the judgment is against the firm, but execution issued on that judgment may be levied, not only on the partnership property and assets, but the individual assets as well. These distinctions are clearly pointed out in the case of *Cox v. Harris*, 48 Ala. 538.

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HARALSON, J.—This is a suit by appellee against appellants, as individuals and as partners, under the firm name of H. C. Marks & Co., to recover damages for maliciously, and without probable cause, causing her to be arrested on a charge of larceny. It is shown, that the article alleged to have been stolen belonged to the partnership, and that the complaint was made, and the issue of the warrant procured, by Sol. Edel, one of the partners; also that the prosecution has terminated, and plaintiff discharged. Exclusive of the participation of H. C. Marks, the other partner, in the prosecution, the only controverted issues involved the existence of malice and of probable cause.

The first exception is to the admission of secondary evidence of the contents of the affidavit and warrant, the ground of objection being, that the loss was not sufficiently shown. The preliminary proof is, that the affidavit and warrant were sent to the sheriff of Jefferson county. The deputy who made the arrest, turned over to the sheriff the affidavit, warrant and bail bond made by plaintiff, asking him to return them to the magistrate before whom the case was to be tried, and that the sheriff enclosed the affidavit, warrant and bond in an envelope, which he sealed and addressed, and which was mailed; but to whom addressed was not shown. The magistrate, before whom the affidavit was made and who issued the warrant, made diligent search in his office, and was unable to find the papers; he further testified, that he never received them from the sheriff. The only defect in the proof, is the failure to show to whom the sheriff addressed the envelope. It being his duty, under the statute, to deliver the warrant to the magistrate issuing it, and before whom it was returnable, the presumption should be indulged, in the absence of proof to the contrary, that, in discharging his duty, he addressed the envelope to the proper officer. There being no ground to suspect, that the papers were withheld for an improper purpose, we think the preliminary proof is *prima facie* sufficient to allow secondary evidence of the contents of the affidavit and warrant.

Exceptions were also taken to the admissibility of two telegrams, one sent by Hirsch to Edel, and the other by Hirsch to Ullman; also the declarations of Edel to the effect, that he would not withdraw the criminal proceed-

ing; he wanted the warrant executed; that plaintiff was a thief, and he would not dismiss the prosecution. Plaintiff was, at the time the telegrams were sent, in the employment of Hirsch, and their object was to induce Edel to abandon the prosecution. No objection was made to the introduction of copies of the telegrams. The only specified objection is, that the one sent to Edel was not shown to have been received by him. This objection is not founded in fact; for the magistrate testifies that Edel showed him the telegram, at which time he made the first two declarations referred to. The other was made, on being shown the telegram received by Ullman. The declarations tended to show the determination of Edel to continue the prosecution, and with the telegrams were relevant and admissible on the question of malice. Any acts or declarations of the defendant tending to show zeal, or persistency in the prosecution, or a purpose to vex or oppress the plaintiff are competent evidence. The motive which influenced the prosecution may be inferred from subsequent conduct.

The exception to the testimony as to the number of persons present when the officer went to arrest plaintiff is well taken. Defendants are not responsible for any wrong or abuse in the manner of making arrest, which was not directed by them, or in which they did not participate, or subsequently approve. Such evidence is not relevant to the issues, having no bearing on the question of malice or probable cause, and only tends to increase the amount of the recovery, by exciting the sympathy of the jury; and this, by proof of facts which form no basis of recoverable damages.

There being evidence tending to show that Creen, the magistrate who issued the warrant, but who is, also, a practising attorney, advised Edel, upon a statement of the facts, there were sufficient grounds for a prosecution, defendants asked the court to charge: "If the jury believe from the evidence, that Edel acted in good faith in making said affidavit, after a full and fair statement of the facts to Mr. Creen, and that Mr. Creen advised such course, then they must find for defendants." It may be regarded as elementary, that to maintain an action for malicious prosecution, it must be affirmatively shown, that the criminal proceeding was instituted or continued, not only through malicious motives, but also, without

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probable cause. These essentials must co-exist. The existence of probable cause does not depend upon the actual guilt of the accused. It may exist, though no offense in fact has been committed. The rule, that the advice of counsel, sought and acted on in good faith, will exempt from liability, is founded on the doctrine, that the question of probable cause rests on an honest and reasonable belief, on the part of the prosecutor, of the guilt of the accused based on such facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, reasonably and without prejudice, to believe, that the person accused is guilty, and such advice, if acted on in good faith, repels all imputation of malice which is inferred from mere want of probable cause. It is definitely and comprehensively stated in *Jordan v. Ala. Gr. So. R. R. Co.*, 81 Ala. 227, 8 So. Rep. 191, by STONE, C. J, in the following language: "Where a prosecutor has fully and fairly submitted to learned counsel all the facts which he knows, or by proper diligence could know, to be capable of proof, and is advised that they are sufficient to sustain the prosecution, and, acting in good faith upon such opinion, he does institute criminal proceeding, he can not be held liable in an action for malicious prosecution, although the legal opinion given be erroneous. Such advice, honestly sought and acted on, supplies the indispensable element of probable cause." This rule originated in the policy of the law to encourage prosecutions when there is probable cause, actual or constructive, and is founded on the theory that persons, who have made the law their study and followed it as a profession, are well recognized advisers on questions of law, and that the citizen is justified in relying and acting on their advice. The protecting power of the rule is limited to the advice of licensed attorneys in good standing, and of reputed learning and competency; it should not be extended beyond these limitations.

The charge under consideration, when referred to the evidence, raises the question, whether the advice of a justice of the peace, when he is also a practising attorney, after a full and fair statement of the facts to him, advises that the prosecution can be maintained, should be allowed the same place in the defense to an action of this character, as is given to the advice of learned coun-

sel. The general rule is, that the advice of a magistrate can not justify a prosecution.—14 Amer. & Eng. Encyc. of Law, 57. Does the fact, that the magistrate is also a practising attorney, have a different effect? We think not. The policy of the law forbids a justice of the peace to act as an attorney, or to advise in regard to a prosecution intended to be instituted before him. The evidence tends to show, that the facts were not stated to Creen nor his advice asked as an attorney, but only as a justice of the peace. A magistrate, acting as such, is not a professional adviser. Upon complaint being made that a public offense has been committed, it becomes the duty of a justice of the peace, under the statutes, to examine the complaint and such witnesses as he may propose, then determine whether there is reasonable ground to believe that the accused is guilty thereof, and if he so finds to issue a warrant of arrest.—Code, §§ 4256–4258. It would be highly improper for him to prejudice the case. Creen, not being charged in his official capacity with the duty of advising defendants to commence a criminal proceeding before him, his advice can not justify their conduct. However learned in the law, it would be an impolitic and an unwarranted extension of the rule to allow the advice or opinion of a justice of the peace, in regard to the sufficiency of the grounds for the institution of a prosecution before him. It is proper to remark that Creen testifies that he has no recollection of giving such advice. There is no error in refusing the charge.—*Brobst v. Ruff*, 100 Penn. St. 91; 45 Amer. Rep. 358.

At the request of plaintiff, the court instructed the jury, upon the hypothesis that there was no probable cause for believing the plaintiff was guilty of larceny, and that the prosecution was instituted and conducted maliciously, they might find for the plaintiff and assess her damages in such an amount as they determine she is entitled to. The charge in respect to the assessment of damages left the jury to assess damages according to their judgment, caprice or sympathy, without direction or instruction as to the elements of damages, or the principles by which their discretion should be governed, or the grounds on which they were authorized to award damages, “to be a law unto themselves, freed from all legal restraints, to assess damages at their own will and pleasure,” unrestrained even by the lim-

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itations of the complaint.—*True v. Plumley*, 36 Me. 466. Under the broad and unlimited terms of the charge, the jury could assess remote or speculative or exemplary damages, though no actual damage, the natural and proximate result of the wrong, was shown.—*Howard v. Taylor*, 90 Ala. 241, 8 So. Rep. 36; *Hamilton v. Smith*, 39 Mich. 222.

There being a conflict in the evidence so far as concerns Edel, the court did not err in refusing to give the affirmative charge for defendants, though a similar charge, applicable to Marks alone, might have been correct. Neither was there error in refusing to charge that Edel had no authority to dismiss the prosecution after it had been commenced. The charge was misleading; the prosecutor could have dismissed the prosecution by permission of the court. Had the evidence shown, that application was made, and the court refused to allow its dismissal, the charge would have been correct; but the evidence showing, on the contrary, that Edel refused to withdraw the prosecution, it was abstract.

The remaining questions arise on the refusal of the court to grant a new trial. Two motions were made for this purpose, one by the defendants jointly and the other by Marks separately. As the judgment must be reversed on other grounds and another trial had, we shall, in consideration that injustice might thereby be done to one or the other parties, refrain from discussing the evidence so far as regards Edel; and would pursue the same course in respect to the separate motion by Marks, were it not, that the complaint proceeds on the theory that the defendants are jointly and severally liable as partners. Though a partnership is responsible for the wrongful act of one of its members, committed in the course, and for the purpose of transacting the partnership business, the willful tort of one partner, when not so committed, is not imputable to the firm. A prosecution for larceny for goods stolen from the firm, is not within the scope of a mercantile partnership. From this principle results the settled rule, that one partner can not be made liable for the arrest or prosecution of a person by a co-partner, on a charge of larceny of partnership property, unless he advises, directs or participates therein, and then only in his individual capacity. Mere knowledge of the prosecution and mere passiveness are not suffi-

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cient to render him liable.—*Gilbert v. Emmons*, 42 Ill. 143; 89 Am. Dec. 412; 1 Lindley on Part., 149. The evidence shows that Marks was in South Carolina when the prosecution was commenced; and he testifies that he had nothing to do with it, and knew nothing of it until he was summoned as a witness on the preliminary trial. The only testimony other than the fact of his being a partner by which it is attempted to connect him with the prosecution is, that he was seen conversing with Edel during the progress of the trial. The preponderance of the evidence is so decided as to clearly convince us that the verdict is wrong and unjust as to Marks.

This opinion was prepared by the late associate Justice Clopton, and adopted by the court.

Reversed and remanded.

COLEMAN, J.—I incline to the view that the opinion in this case should be explained or qualified. To sustain the action, it must be shown that the prosecutor was actuated by malice and acted without probable cause. When a person goes before a magistrate, and makes affidavit that an offense has been committed, and that he has reasonable grounds for believing that A. B. is guilty—without more—and the magistrate issues a warrant upon such affidavit, the fact that the magistrate issued a warrant can not be given in evidence by the defendant, either upon the question of malice or probable cause.

Section 4256 of the Criminal Code makes it the duty of the magistrate before whom complaint is made, “to examine the complainant, and such witnesses as he may propose, on oath, take their depositions in writing, and cause them to be subscribed by the person making them.”

Section 4257: “The depositions must set forth the facts stated by the complainant and his witnesses, tending to establish the commission of the offense, and the guilt of the defendant.”

Section 4258: “If the magistrate is reasonably satisfied from such depositions that the offense complained of has been committed, and there is reasonable ground to believe that the defendant is guilty thereof, he must issue a warrant of arrest.”

My understanding of the law is, that if the party com-

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plaining pursues the above provisions of the statute, and makes a full and fair statement of the facts, and as he has reasonable grounds to believe they exist, after a fair investigation, and the magistrate, in the discharge of his judicial duty, being reasonably satisfied from the statement that the offense has been committed, issues a warrant of arrest, under which the accused is prosecuted, the party complaining before the magistrate, if afterwards sued for a malicious prosecution, is entitled, on the question of malice, to the benefit of the proceedings and complaint before the magistrate, as evidence tending to rebut malice.

It is well settled, "That a prosecutor, who fully and fairly submits to counsel, learned in the law, all the facts which he knows, and by proper diligence could know, to be capable of proof, and is advised that they are sufficient to sustain the prosecution, and, acting in good faith upon such opinion, he does institute criminal proceedings, he can not be held liable in an action for malicious prosecution, although the legal opinion given be erroneous. Such advice, honestly sought and honestly acted on, supplies the indispensable element of probable cause. And such advice conscientiously sought and obtained tends to rebut malice."—*Jordan v. Ala. Gr. So. R. R. Co.*, 81 Ala. 227, 8 So. Rep. 191; *McLeod v. McLeod*, 73 Ala. 42; *Leaird v. Davis*, 17 Ala. 27. Such advice thus acted upon, as a matter of law, furnishes a complete defense to the whole action.

The weight of authority, in my opinion, holds that such advice given by a justice of the peace, though acted upon, will not afford the prosecutor a complete defense. Without proof of malice a suit for malicious prosecution can not be maintained. Whatever legally rebuts proof of malice should be admitted in evidence. In the case at bar, the defendant testified that he "called to see J. F. Creen, and related to him what I had heard, as above stated. * * * I then told him to talk with Regina, and she told him in my presence," &c. "After this conference, I asked Mr. Creen, if he thought I had sufficient ground to have Miss Hastings arrested for the larceny? Mr. Creen replied he thought I did have sufficient grounds and I then made the affidavit for her arrest." Mr. Creen, as the evidence shows, was a practising attorney of ten years. He was also a magistrate, and

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the affidavit for the arrest was made before him. It is evident that if the prosecutor had left Mr. Creen, and gone before some other magistrate, and made the affidavit, these circumstances, if the facts were fully and fairly stated and his advice acted upon in good faith, would have furnished a complete defense. The evidence was certainly competent, in my opinion, upon the question of malice. The reason given why the advice of a justice of the peace will not justify the institution of a prosecution is that they are persons not learned in the law, and, therefore, the party is not justified in relying upon such advice; but when the proof shows that the magistrate is a person learned in the law, the reason fails, and the rule ought not to apply. It may have been improper for the justice of the peace to have issued the warrant in a case in which, as an attorney, he had given the advice. The fact that the warrant, "after the conference with him," was sued out before him, "may have been a question for the jury in determining whether the advice" was honestly sought and honestly acted on—whether the prosecution was *bona fide*. It was certainly competent to show these facts, and if *bona fide* acted upon, their tendency was to repel malice. The following cases are authority upon this question, though I do not go to the extent of the proposition declared in some of the cases. *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. 174; *Russ v. Hixon*, 46 Kansas, 560. This case is reported in 26 Am. St. Rep. 123, and a full discussion of the question may be found in the notes, with many citations. See also Newell on Malicious Prosecutions, p. 323, §§9, 10, and citations. *Newman v. Davis*, 58 Iowa, 447. This very question was decided in a recent Massachusetts case, which upholds the position here taken. *Monaghan v. Cox*, 155 Mass. 487, s. c. 31 Am. St. Rep. 555.

I concur that the case should be reversed.

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Bill in Equity to enjoin Action of Ejectment, and to enforce Trust in Land.

1. *Purchasers of public land under act of June 15, 1880.*—Under the Vol. 101.

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provisions of the act of Congress of June 15, 1880 (1 Sup. Rev. Stat., p. 558), only the person who has made entry of homestead and failed to perfect the same, or the transferee of such entry-man by writing, executed in good faith, can purchase the land attempted to be entered.

2. *Contract violative of the public policy of the United States.*—A verbal contract by one who makes a homestead entry of Government land and fails to perfect the same, to purchase such lands under the act of Congress of June 15, 1880, (1 Sup. Rev. Stat. p. 558), and upon receipt of patent convey the lands to the one who furnishes the money with which to make the purchase, is violative of the policy of the General Government, and can not be made the basis of equitable relief to enforce a trust in such lands in favor of the one whose money was used in paying therefor.

APPEAL from the Chancery Court of Cleburne.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed by the appellant, Hiram Mulloy, against the appellee, Duncan Cook, to enjoin the prosecution by the respondent of an action of ejectment against the complainant, and to have the legal title to lands involved in such suit divested out of said Cook and invested in the complainant. The bill averred that on January 23, 1874, Duncan Cook, a resident of Cleburne county, Alabama, entered from the United States Government the East $\frac{1}{2}$ of the Northwest $\frac{1}{4}$ of section 25, township 17, range 11, East, in Cleburne county, Alabama, as a homestead, and upon payment of the fees, obtained the receiver's receipt therefor; that said Cook afterwards abandoned the homestead entry, and that on September 20, 1880, the complainant furnished to the said Cook the money with which to purchase the lands which were abandoned by him from the Government under the provisions of the act of Congress of June 15, 1880; that it was the understanding and agreement between Cook and the complainant, at the time he advanced the money with which to purchase the land, that Cook would purchase the land in his own name for the benefit of the complainant, and convey to him the title thereto, as soon as he received the patent from the Government; that the money so advanced to Cook was used by him in the purchase of said lands, for which he received a certificate and receipt for purchase from the United States Government, delivered the certificate and receipt to the complainant, and that thereupon the com-

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plainant entered into possession of said land, and afterwards secured the patent to be issued therefor to the said Cook; that while in the peaceful and quiet possession of the lands, the said Cook, on December 28, 1889, instituted an action of ejectment against the complainant to recover the possession of said lands.

The prayer of the bill was for an injunction restraining the further prosecution of the action of ejectment, and to enforce a trust in said lands in favor of the complainant. The respondent demurred to the bill on the following grounds: 1st. That the bill shows on its face that the contract it seeks to enforce is contrary to public policy, and is void. 2d. The bill shows on its face that the trust it seeks to establish is based upon a contract that is against public policy and void.

Upon the submission of the cause upon these demurrers, the chancellor sustained them. The complainant appeals, and assigns as error this decree of the chancellor.

J. H. SAVAGE, for appellant.—Where one purchases land and pays for it, and takes the title in the name of another, the party receiving the title holds it in equity in trust for him who furnished the purchase money. This trust in lands applies to lands purchased from the United States as well as from individuals.—*Irvine v. Marshall*, 20 How. (U. S.) 558; *Silver v. Ladd*, 7 Wall. (U. S.) 219; *Foster v. Trustees*, 3 Ala. 302; *Cagle v. McCollum*, 27 Ala. 461; *Robison v. Robison*, 44 Ala. 227; *Glenn v. Glenn*, 47 Ala. 204; *Nettles v. Nettles*, 67 Ala. 599. Under the authority of the act of June 15, 1880, the complainant was entitled to purchase the lands, and having furnished the money therefor, is now entitled to the relief he seeks.—*Thrift v. Delaney*, 10 Pac. Rep. 475, (Cal.); *Fideler v. Norton*, 30 N. W. Rep. 128; Gould and Tucker's Notes on the Revised Statutes, §§ 2301, 2319.

KELLY & SMITH, contra.—The complainant in the present case is not the homesteader, nor has there been any attempt in writing to transfer the rights of the homesteader to him. He is, therefore, not entitled to the relief he seeks, under the provisions of the act of June 15, 1880.—*Johnson v. Collins*, 12 Ala. 322; *Smith v. Johnson*, 37 Ala. 633; *Nichols v. Council*, 14 Amer. St. Rep. 20.

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McCLELLAN, J.—We do not think the present bill is open to the objection urged against it by the demurrers. It can not be said that the contract sought to be specifically enforced is violative of the public policy of the United States. We know of no statute, nor of any general policy deducible from the statutes of the Federal Government, which would authorize or admit of a distinction being made in favor of, or against, the right of any citizen to purchase public land. Had nothing been done by the respondent looking to the entry of the land in controversy as a home, the complainant could have purchased it under section 2357 of the Revised Statutes, for one dollar and twenty-five cents per acre. The effort to homestead it having failed, the land again became public in every sense, and purchasable by the complainant under that section. The Government had no interest and no policy to be subserved in securing to the would-be homesteader a prior right to purchase as against the complainant, or any other citizen. No pre-emption or homestead right of the individual or policy of the Government is involved at all. The land, once purchased by and patented to either the person who made the entry or to another, may be alienated in all respects as any other real property. Since the purchaser is not charged with any of the duties as to occupancy, cultivation and the like, which would have been imposed upon him as a homesteader, and since the land itself has none of the exemptions from incumbrances and prior personal obligations which would attach to it as a homestead, it is a matter of no consequence to the Government or its policy that, even before the purchase, a contract had been entered into on the part of the purchaser to convey it to another upon patent issuing. Every governmental purpose would be equally conserved whether the purchaser intended, and did in fact continue to hold the land, or intended to convey and had made a contract to convey, and did in fact convey it to another. The only change in existing law effected by section 2 of the act of June 15, 1880, was to allow any purchaser who had made the payment on homestead entry required by Revised Statutes, § 2290, or any person to whom he had by written instrument attempted to transfer the rights conferred on him by such entry, a credit on the sum otherwise payable in purchase of the land to the amount paid on the

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entry. If no such transfer is executed by the entryman, none but he is entitled to this credit, though any other person may purchase paying the full price. If such instrument has been executed, the nominal transferee alone is entitled to the credit. In either event, the Government, not being interested in the uses to which the land is devoted, nor in respect of the persons who shall own it, no previous contract to convey it, or subsequent conveyance, whether in consonance with a previous contract or not, can in any degree be said to violate any statute or the public policy of the United States. In the case at bar, it may be true that the complainant will ultimately get the benefit of the credit in amount equal to the sum originally paid by the respondent, but that is a matter between the parties to this suit, and having, we conceive, no bearing upon the question of public policy presented by the demurrers.

REHEARING.

On the application for a rehearing in this case, the fact that the land involved was not open to public sale at the time Cook acquired his patent from the Government is brought to the attention of the court. The opinion heretofore delivered, holding that the contract between complainant and Cook, by which the former supplied the money to purchase the land in the name of the latter, under the act of June 15, 1880, with the understanding that Cook should, on receiving a patent, convey the land to the complainant, was not violative of public policy, proceeded on the assumption and is based on the consideration that at that time the complainant, in his own right and without reference to Cook's right under the act referred to, could have purchased the land from the United States. That assumption being unfounded, and that consideration being eliminated, the truth being that at the time in question only the person who had made entry of homestead and failed to perfect the same, or the person to whom such entryman had attempted in writing to transfer his inchoate homestead right, had a right of purchase at all, and then only under the act of 1880, the opinion fails of the support upon which it was rested, and must be withdrawn. It would seem to necessarily follow from the facts, that the land could not be pur-

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chased at all except by the homesteader, or his transferee by writing executed in good faith, and that complainant is neither the one nor the other, that the contract and transaction alleged in the bill, through which alone complainant seeks relief, is violative of the policy of the general government, as evidenced by statutes, and can not be made the basis of the equitable relief prayed; and we accordingly so hold.—*Johnson v. Collins*, 12 Ala. 322; *Dewhurst v. Wright*, 10 So. Rep. 682.

The judgment of reversal heretofore entered will, therefore, be set aside, and the decree sustaining demurrers to the bill be affirmed.

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Petition for Sale of Lands for Distribution.

1. *Sale of homestead for distribution; when owned jointly by husband and wife can not be made against the wife's objections.*—When a homestead is owned jointly by husband and wife, the probate court can not, upon petition by the husband, decree a sale thereof for distribution against the wife's objections.

2. *Same.*—The fact that at the time of the filing of the petition by the husband for the sale, for distribution, of the homestead, owned jointly by husband and wife, the said husband and wife were living separate and apart, does not give the probate court the right to order a sale of the homestead, against the objection of the wife. So long as the relation of husband and wife exists, the home of the husband is deemed to be the home of the wife.

3. *Sale of lands for distribution; burden of proof.*—Land can not be sold for distribution except upon satisfactory proof that it can not be partitioned without the sale; and the burden rests upon the petitioner to make this proof.

APPEAL from the Probate Court of Conecuh.

Heard before the Hon. P. C. WALKER.

Charles J. Mitchell, the appellee, filed his petition in the probate court asking for a sale, for distribution, of certain lands, which were averred to be owned jointly by himself and the appellant, C. H. Mitchell. C. H. Mitchell filed a plea in abatement to the petition, setting up the fact that she was the wife of the petitioner, and

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that the lands were owned jointly by them, and was their homestead. The petitioner demurred to this plea, on the ground that it was no sufficient answer to the petition, which demurrer the court sustained, and the respondent duly excepted. Issue was then formed upon the answer of the respondent, setting up the facts as to the manner in which she and the petitioner acquired the joint ownership of the property; and upon the submission of the cause, on the evidence introduced, the court granted the relief prayed for, and ordered the sale of the property. The respondent prosecutes this appeal, and assigns as error the rulings of the court in sustaining the demurrer to her plea, and the decree of the court ordering a sale of the property.

STALLWORTH & BURNETT, for appellant.

FARNHAM & CRUM, *contra*.—The parties being husband and wife and the property sought to be sold being their homestead, can not prevent the relief prayed for in the petition.—*Witherington v. Mason*, 86 Ala. 345; 3 Brick. Dig. 495, §§ 86–87.

COLEMAN, J.—Charles J. Mitchell instituted this proceeding in the probate court, to obtain a decree for the sale of lands for partition. The petition and proof show the lot of land, which is sought to be sold for distribution, is the property of himself and wife, C. H. Mitchell, conveyed to them jointly by deed during the year 1890, and constitutes their homestead. The sale is resisted by the wife.

At common law, lands thus held were not the subject of partition.—*Walthall v. Goree*, 36 Ala. 736. By statutes of this State, in so far as to vest the wife with the right to acquire and hold property in her own right and name, the husband and wife, are two distinct persons. By act of February 28th, 1887, carried into the Code of 1886, Part 2, Title 5, Article III, with but few limitations, the wife is emancipated from the disabilities of coverture. She can now hold the legal as well as equitable title to her property, and can sue alone upon all contracts made by or with her, or for the recovery of her separate property, for injuries to her property or person or reputation. She can maintain an action against her

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husband. To contract, she must have the assent or concurrence of the husband expressed in writing. This is about the only limitation upon her power to act as a *seme sole*.

By section 787 of the Code, subdivision 10, jurisdiction is conferred upon the probate court to "partition lands within their counties." Section 3237 provides: "Any property real, personal or mixed, held by joint owners or tenants in common may be divided among them, on the written application of one or more of the owners to the probate court of the county in which the property is situated," &c., and by section 3253 of the Code such property may "be sold for distribution, when the same can not be equitably and fairly partitioned." We have no doubt that under our statute property held jointly or as tenants in common by the husband and wife, ordinarily, are governed by the same rules and principles of law, in the matter of partition, or sale for distribution, as apply to property held and owned by persons occupying a different relation to each other than that of husband and wife.—Freeman on Co-tenancy & Part., § 458. But do these rules and principles apply to a sale for distribution of the homestead, owned jointly or as tenants in common by the husband and wife, the wife objecting to the sale? The constitution of the State expressly prohibits the "alienation of the homestead by the owner thereof, if a married man, without the voluntary signature and assent of the wife to the same," and the only manner in which her voluntary signature and assent may be effectuated to such alienation is regulated by statute. It is true that a sale of the homestead for distribution under the decree of the court, would not be, strictly speaking, an alienation by the husband; but a decree to that effect, upon his application, enables him to defeat the constitutional provision made for the protection of the wife, and indirectly accomplish an unlawful end. If there were other joint owners or tenants in common with the husband, or with the husband and wife, the same legal objection would not lie to the right of such person to sever and separate his interest from the other tenants in common. The spirit of our constitution and the statute in regard to the homestead, enacted for the benefit of the wife, positively prohibits its alienation by the husband, except in the manner pre-

scribed, and he can no more do this by resorting to the courts than by direct deed.

There is evidence tending to show that although living in the same town, they are living separate and apart. This can make no difference, so long as the relation of husband and wife exist. So long as the relation exists the home of the husband is, in law, deemed the home of the wife.

The plea of the defendant, setting up the fact that the parties were husband and wife, and the parcel of land sought to be sold for distribution constituted the homestead, presented a complete defense, and the demurrer to the plea was improperly sustained. Independent of the plea, we think the court erred in its conclusion from the evidence. The burden rested upon the petitioner to show that the lot or parcel of land could not be fairly and equitably divided without a sale. Looking at all the evidence in the case, the burden resting upon the petitioner, to prove that the lot could not be fairly partitioned, was not satisfactorily met. The law will not permit the sale of one person's property, even for distribution, merely to gratify the desire of another. It is allowed, when resisted, only upon satisfactory proof that it can not be partitioned without a sale.

The court erred, both in its ruling as to the law of the case, and in its conclusion from the evidence.

The decree of the lower court is reversed, and the cause remanded that judgment may be rendered in accordance with the principles of law herein declared.

Reversed and remanded.

Bell et al. v. Otts.

Statutory Action of Ejectment.

1. *Judgment; definition thereof.*—A judgment is a final consideration and determination by a court of competent jurisdiction of matters submitted to it, and it should, in form, always be complete and certain in itself, showing that it is the court's adjudication.

2. *Same; when insufficient to support an appeal.*—The statement in a judgment entry in an action of ejectment, just after the recital of the

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verdict, "and judgment is rendered against defendants, for the land sued for, ~~together with~~ all the costs in this behalf, for which execution may issue," is not such a judgment as will support an appeal; and when the transcript contains no other judgment entry, ~~the appeal will~~ be dismissed.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. JAMES B. HEAD.

This was a statutory action of ejectment brought by the appellee against the appellants; and sought to recover certain described property. The judgment from which the present appeal is prosecuted is in the following language: "This day came the parties by their attorneys, and the demurrer to pleas were sustained by the court, the material facts therein averred being provable under the general issue; and issue being joined, thereupon came a jury of twelve good and lawful men, to-wit: R. W. Beck and eleven others, who, being duly sworn and empannelled according to law, on their oaths say, 'We the jury find for the plaintiff for the land sued for, viz., S. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 6, T. 13 S., R. 2 W., in Jefferson Co., and twenty-five dollars damages for detention as against defendant, Martha Bell,' and judgment is rendered against defendants Samuel Mace and Henry Edwards for the land sued for, together with all the costs in this behalf expended, for which execution may issue." The opinion renders it unnecessary to notice in detail the several rulings of the lower court.

S. J. DARBY, and B. K. COLLIER, for appellants.

ALEX. T. LONDON, *contra*.

HARALSON, J.—The verdict in this case was, "We the jury find for the plaintiff for the land sued for [describing it], and \$25, damages for detention against defendant Martha Bell." On this verdict a judgment ought to have been entered against all the defendants for the land sued for, for \$25 against Martha Bell, as damages for detention, and against all of them for the costs.—Code, §§ 2709-10; 67 Ala. 197. Immediately following this verdict, with a comma between, appears what purports to be a judgment in the cause, based on the verdict, namely: "And judgment is rendered against defendants, Samuel Mace and Henry Edwards, for the

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land sued for, together with all the costs in this behalf, for which execution may issue."

A judgment should be complete and certain in itself, and must appear to be the act, the adjudication of the court, and not a memorandum or certified result.—*Speed v. Cocke*, 57 Ala. 209. Among various definitions of a judgment in the books, not differing in legal effect from each other, we have the one, that it is "the final consideration and determination of a court of competent jurisdiction, upon the matters submitted to it.—1 Freeman on Judgments, § 2; *Whitwell v. Emory*, 59 Am. Dec. 220. The language of a judgment is, "it is considered by the court, that the plaintiff have and recover, or that the defendant go without day." If ever what purports to be a judgment falls short of being a finding, an adjudication of the court, complete and certain, but is in substance a mere memorandum of the clerk which declares, as here, no more than that a judgment was rendered, without setting out what the judgment was, it can not be sustained as the final consideration and determination of the court.—*Bank v. Godbold*, 3 Stew. 240; *Hinson v. Wall*, 20 Ala. 298.

There is here absolutely nothing in the shape of a judgment against the defendant, Martha Bell, for anything; and as for the other defendants, there is simply a declaration, that judgment is rendered against them for the land and costs, but no judgment is in fact rendered. This entry is lacking in form and material averments to constitute it a judgment, and to support it as such would be to sanction an uncertainty and looseness in the record and preservation of solemn and important judicial ascertainment, such as would be pernicious.

Our conclusion is, there is no such judgment here as will support an appeal, and it is, therefore, dismissed.

Appeal dismissed.

[Carmen & Begg et al. v. Alabama National Bank.]

Carmen & Begg et al. v. Alabama National Bank.

Bill in Equity to enforce Landlord's Lien, and for an Injunction.

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1. *Landlord's lien; can be enforced independently of attachment.*—A lien secured to the landlord of a storehouse, dwelling house, or other building by section 3069 of the Code of 1886, can be enforced independently of the remedy by attachment given in section 3070 of the Code.

2. *Attachment; resort thereto no bar to bill by landlord to enforce his lien.*—The remedy by attachment being cumulative, a resort to that writ for the enforcement of rent already matured, is no bar to a suit in equity by a landlord to enforce his lien against the proceeds of sale under attachment, issued at the instance of other creditors of the tenant, for the rent not matured.

Appeal from the Chancery Court of Mobile.

Heard before the Hon. W. H. TAYLOR.

The bill in this case was filed on July 18, 1892, by the Alabama National Bank of Mobile, against William H. Carmen and Peter Begg, as partners, under the firm name of Carmen & Begg, The Commercial Printing Company, a corporation, Edwin Colburn, The St. Louis Paper Company, a corporation, and W. H. Holcombe, the sheriff of Mobile county.

The averments of the bill disclose the following facts: On October 31, 1891, the complainant, the Alabama National Bank, leased to Carmen & Begg, for one year, a certain storehouse, which was to be used by the lessees as a public printing house; that for the rent of said storehouse, Carmen & Begg agreed to pay \$600, and executed their 12 promissory notes for \$50 each, which were made payable on the 2d day of November, 1891, 2d day of December, 1891, the 2d day of January, 1892, and the 1st day of each succeeding month thereafter, down to and including November 1, 1892. Shortly after Carmen & Begg obtained said lease and executed their notes, they formed a corporation for the purpose of conducting the business, in which they, as a partnership, were engaged, and the name of the corporation was the Commercial Printing Company. Carmen & Begg transferred to the Commercial Printing Company all of the property

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with which they were conducting business in the building leased from the Alabama National Bank, which property was then in the said building and subject to complainant's lien. The Commercial Printing Co. conducted the said business in the said building until March 4, 1892. The Commercial Printing Co. having become indebted to Edwin E. Colburn and the St. Louis Paper Co., each of the latter sued out in the city court of Mobile an attachment against the said Commercial Printing Co. on March 4th and 5th, 1892, respectively, and these attachments were each levied upon the property of the Commercial Printing Company, which was situated in the building leased from the Alabama National Bank, and a part of which had been transferred to the Commercial Printing Company by Carmen & Begg.

Carmen & Begg paid the first of their rent notes to the Alabama National Bank when it fell due, but made default in the payment of each of their other notes, as the same became due, down to and including the rent note falling due on July 1, 1892. On March 15, 1892, the Alabama National Bank sued out from the city court of Mobile an attachment against Carmen & Begg for so much of said rent as was then due, viz., \$150, with interest, which attachment was levied upon the property which had previously been levied upon under the attachments of Colburn and the St. Louis Paper Co. On April 16, 1892, the Alabama National Bank sued out of the city court of Mobile another attachment against Carmen & Begg for the sum of \$50, which had become due since its previous attachment was sued out, and this latter attachment was levied upon the same property. The 4th paragraph of the bill is as follows: "The property levied upon as aforesaid was, under an order of the court made in the case of Edwin E. Colburn against the Commercial Printing Company, sold as perishable for the sum of six hundred and seventy-six and 94-100 dollars, which said money is now in the hands of William H. Holcombe, who is the sheriff of Mobile county. Complainant does not know what has become of the property so sold, and could not identify or trace more than a small portion of the same. A motion has this day been granted by the city court of Mobile in the case of the defendant, the St. Louis Paper Company, against the Commercial Printing Company for the distribution of said fund in

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the city court, and the lien of complainant, as the landlord of said Carmen & Begg, upon the property which produced said fund, and upon said fund; and if said fund is so distributed without first satisfying the lien thereon, the complainant will be remediless."

The Alabama National Bank, as complainant, prayed that the court should declare the amount of the indebtedness due, and to become due to it for the rent of said building, and that the same be declared a lien upon the proceeds of said property in the hands of the defendant, William H. Holcombe, and that so much of the proceeds as the complainant is entitled to, be paid over to it, and further prayed that an injunction be issued enjoining the said Holcombe from distributing the said money among the defendants, and from otherwise disposing of it until this cause be heard, and to restrain the defendants from demanding or receiving any of the money from said William H. Holcombe. A temporary writ of injunction was issued.

The defendants demurred to the bill, among others, upon the following grounds: 1st. That the complainant had an adequate and complete remedy at law. 2d. That the bill was without equity. 3d. That the bill shows that, at the time of the levy of the attachment for rent, the property levied upon was not the property of Carmen & Begg, but was the property of the Commercial Printing Company. 4th. That according to the averments of the bill, the complainant was guilty of laches, in not enforcing its lien at the time of the conveyance by Carmen & Begg to the Commercial Printing Company. 5th. That by the complainant having sued out attachments for a part of its demand only, it has waived and lost its lien on the property for the rent which was to become due. 6th. That the complainant is seeking by its bill to invoke the aid of chancery to protect it from its own negligence and laches. 7th. Because, for aught that appears in the bill, the said court made its order of distribution of said funds with due regard to the rights of the complainant. The defendants also moved to dismiss the bill and to dissolve the injunction for the want of equity.

Upon the submission of the cause upon the demurrers and motion, the chancellor overruled each of them. The defendants appeal, and assign this decree of the chancellor as error.

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PILLANS, TORREY & HANAW and McCARRON & LEWIS,
for appellants.

F. G. BROMBERG and G. L. & H. T. SMITH, *contra*.—
(1.) The appellee had a lien for its rent upon all chattels situated in the leased premises belonging to tenants, and this lien could not be impaired by any act of the tenants so long as the chattels remained upon the leased premises, and *a fortiori*, could not be displaced by any attachment of the creditors of the tenants. Attaching creditors have no better rights to property than the debtor has. The landlord's lien attached to his tenant's goods by operation of law, and is superior to every other.—Code of 1886, § 3069; *McKleroy v. Cante*y, 95 Ala. 295, 11 So. Rep. 258; *Ex parte Barnes*, 84 Ala. 543; 4 So. Rep. 769; *Weil v. McWhorter*, 94 Ala. 540, 10 So. Rep. 131; *Aderhold v. Blumenthal*, 95 Ala. 66, 10 So. Rep. 230. (2.) At the time the said order was made only a part of the rent had become due and in default, and the appellee had sued out writs of attachment only for the instalments of rent due and unpaid. There was no way left for enforcing at law the appellee's lien as landlord for the rent to become due for the period subsequent to the sale of the property by the sheriff as perishable and resort to equity became necessary and allowable.—*Bingham v. Vandegrift*, 93 Ala. 283, 9 So. Rep. 280; *Westmoreland v. Foster*, 60 Ala. 448; *Abraham v. Hall*, 59 Ala. 387. (3.) The appellee could not interpose a claim suit in the city court upon any statutory ground.—*Treadway v. Treadway*, 56 Ala. 390; *Jackson v. Bain*, 74 Ala. 328.

STONE, C. J.—Section 3069 of the Code of 1886 declares that "The landlord of any storehouse, dwelling-house, or other building, shall have a lien on the goods, furniture and effects belonging to the tenant for his rent, which shall be superior to all other liens, except those for taxes." This certainly secures a lien of a very high order; a lien which exists, and can be enforced, independently of the remedy by attachment given in section 3070—*Westmoreland v. Foster*, 60 Ala. 448; *Union W. & E. Co. v. McIntyre*, 84 Ala. 78, 4 So. Rep. 175. See also *Espalla v. Towart*, 96 Ala. 137; 11 So. Rep. 219.

We hold that the remedy by attachment is cumulative, and that a resort to that writ for the enforcement of the
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matured part of the rent notes, is no bar to the present suit.—3 Brick. Dig. 804, §97. The averments of the bill make a case where equity alone can administer the proper relief, and enforce the paramount lien which it asserts.

It is claimed for appellants that because the bill is silent as to the disbursement of the proceeds of the attached property, as ordered by the city court, we can not know that the indebtedness for rent was not ordered to be first paid; and, hence, that we can not know that the complainant was aggrieved or injured by that order. It is contended that for this omission the injunction should be dissolved. This is scarcely a full presentation of the case, as made by the bill. It does appear by necessary implication that seven of the rent notes, aggregating \$350, were not in suit, and, consequently, they were not before the city court, and could not have been considered in the order then made.

The bill, in its fourth paragraph, needs amendment. It should have set forth the substance of the order of distribution made by the city court. We will, however, make no order touching this matter. Unless the amendment is seasonably made, the chancery court will make the proper order.

The decree of the chancellor is affirmed.

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Bill in Equity for Final Settlement of Estate, and to charge Estate of Sureties for devastavit by administrator.

1. *Statute of non-claim; operation against claim for devastavit.*—On the death of an administrator, not having made a final settlement of his trust, and being indebted to the estate for the loss or destruction of property intrusted to him, his devastavit constitutes such a breach of his administration bond as to make it an accrued claim against his sureties thereon, and the running of the statute of non-claim is, at once, put into operation.

2. *Same; presentment.*—The presentment of a claim, as contemplated by the statute of non-claim (Code, §2081), can only be made by a party interested in the claim; and the nature and amount of the

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claim must be brought to the attention of the personal representative.

3. *Same; presentment by filing bill in equity.*—A bill to enforce a claim against personal representatives of deceased sureties on an administration bond, which alleges that the claim was presented to the defendants by the filing of a bill against them by a certain named person, whose interest in the claim was not shown, and the nature and amount of the claim was not disclosed by the bill so filed, does not show such a presentment of the claim as is required by the statute of non-claim; such averment of presentment being merely a conclusion of the pleader.

4. *Bill to enforce claim for devastavit; multifariousness.*—A bill to enforce a claim for devastavit against personal representatives of some of the sureties on an administrator's bond, and for a settlement of the estate, and also to enforce against the personal representatives of the other sureties, in their individual capacities, the personal penalty for failure to give the notice to creditors required by law, is multifarious.

5. *Same; demurrer for want of parties.*—A bill against the personal representatives of the sureties of an administrator's bond for a settlement of the estate and to enforce a claim for devastavit, which avers that one of the heirs of the decedent is dead, and that her estate is entitled to whatever amount she would receive if living, but which makes neither her personal representative nor her heirs parties, and does not aver that there is no administrator or executor of her estate, or children surviving her, is demurrable for want of proper parties.

6. *Same; appointment of administrator ad litem.*—Such a bill does not make a case for the appointment of an administrator *ad litem* under the statute (Code, §2283), which provides that when, in any proceeding in the probate or chancery court, the estate of a deceased person must be represented, and there is no executor or administrator of such estate, it shall be the duty of the court to appoint an administrator *ad litem* whenever the facts rendering the appointment necessary shall appear in the record, or shall be made known by affidavit.

7. *Creation of new county; transfer of administration from probate court of old to new county.*—The legislature, in the passage of the act approved December 7, 1866 (Acts 1866-67, p. 92), creating the county of Clay out of portions of Talladega and Randolph, made no provision concerning the administration of estates pending in the probate courts of the old counties; and in the absence of any such provision such administrations continued in the probate courts of the parent counties, unaffected by the formation of the new county, although the property of the estate is situated, and the administrator resides, in the new county.

8. *Same.*—In an act forming a new county out of portions of old counties, a provision for the transfer of suits pending against defendants from the courts of the old counties into those of the new, without referring to administrations pending in the former, is to be construed as an expression of legislative intent that such administrations should not be removed into the probate court of the new county.

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9. *Same; transfer of administration from probate to chancery court.*—

Where an act forming a new county out of portions of two old counties makes no provision concerning the administration of estates pending in probate courts of the older counties, if it becomes necessary or proper to transfer into a court of equity the settlement of the administration of an estate situated in the new county, but which was pending in the probate court of one of the older counties, such settlement must be removed into the chancery court of the old county in whose probate court such administration was pending; the chancery court of the new county having no jurisdiction thereof.

APPEAL from the Chancery Court of Clay.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed by the appellants against the appellees in the chancery court of Clay county, and prayed to have the administration of the estate of James E. Mayes, deceased, removed into the chancery court of Clay county, from the probate court of Talladega county and to hold the sureties on the administration bond of J. W. King, as administrator of James E. Mayes' estate, responsible for an alleged devastavit.

The original bill was filed on September 26, 1891, by James H. Page, as administrator of Martha Harris, deceased, formerly Martha Mayes, widow of James E. Mayes, deceased, and others, who were the heirs at law of James E. Mayes, against the appellees, and also against J. L. Hood, as administrator of Jane Halsell, deceased, a sister of said Mayes.

The allegations of the bill, briefly summarized, are as follows: James E. Mayes died on June 29, 1862, a resident citizen of Talladega county, and on August 29, 1862, J. W. King was appointed administrator of his estate, and gave bond as such administrator with J. L. Barnhill, L. M. Burney, J. D. McCann, J. F. Martin and Thomas Adams as his sureties. The said King, acting as such administrator, received considerable property as assets of the estate of James E. Mayes, deceased. King made several partial settlements of his administration, the last being made in the probate court of Talladega county on May 30, 1877; at the time of this settlement he had in his hands a large amount of money belonging to said estate. King, as such administrator, never made a final settlement of his administration, but moved to the State of Arkansas, and afterwards died there in the year 1889, owing the estate of said Mayes a

large amount of money—at least \$16,000. All the other facts averred in the original bill as amended are sufficiently stated in the opinion. The prayer of the bill was for the removal of the administration of James E. Mayes' estate from the probate court of Talladega county into the chancery court of Clay county, to settle said estate in the chancery court of Clay county, and to charge the personal representatives of the several deceased sureties on the bond of said J. W. King, as administrator of James E. Mayes, deceased, with his alleged devastavit.

The defendants demurred to the bill. The principal grounds of demurrer were as follows: 1st. That there was not shown by the bill a sufficient presentment of the claim on which the suit was founded under the statute of non-claim, and no sufficient reason or excuse is averred for the failure of claimants to present such claim. 2d. That it was not shown upon what claim or cause of action the suit alleged to have been brought by Mattie Page on February 8, 1890, was founded, nor what right said Mattie Page had to present said claim; but it was shown that said suit was virtually abandoned by amendments which made an entire change of parties complainant. 3d. There was no privity shown between J. H. Page, as administrator, and Mattie Page; nor was it shown that the latter had any right to present or demand the claim on which this suit is based. 4th. There was no sufficient reason or facts shown in the bill as amended to dispense with the further administration of the estate of James E. Mayes. 5th. The administrator *de bonis non* of said Mayes' estate was a necessary party complainant to the bill. 6th. That the bill was multifarious, in that as amended it sought to recover a statutory penalty against W. T. Bishop and John H. Short in their individual capacity, and at the same time also sought a settlement of the administration, and to enforce a charge on the estates of the deceased sureties. 7th. That it was affirmatively shown that more than 18 months had elapsed from the appointment of the administrator of Burney's estate before the bringing of the suit by Mattie Page, on February 8, 1890. 8th. That on the facts shown in the bill the court could not appoint an administrator *ad litem* on the estate of Sarah King, deceased, but her heirs or administrator were necessary parties. 9th. That the chancery court of Clay county can not

take jurisdiction of this cause, or of the settlement of the estate of James E. Mayes, deceased.

On the submission of the cause on these demurrers the chancellor sustained the same. The complainants appeal, and assign as error this decree of the chancellor.

W. L. HOOD, for appellants.—The first suit was a sufficient presentation of the complainant's demand, and, this suit is to recover the same claim by the same parties and continues the same presentation.—*Floyd v. Clayton*, 67 Ala. 265. Mattie Page was the sole party complainant bringing the first suit, filed February 8, 1890, as shown by this bill, but section one of the amendment to the bill avers, that by amendment to the former suit, filed September 18, 1890, all the other complainants in this suit joined in that suit. The amendment setting up no new claim, became part of the original bill.—*Adams v. Phillips*, 75 Ala. 461. The office of amendment which does not introduce supplemental matter, is the curing of defects, and reverts to the filing of the bill.—*Ward v. Patton*, 75 Ala. 207.

A court of equity will dispense with an administration altogether when the only office of an administrator would be to collect and distribute the assets of the estate. If no debts exist it is useless to carry the estate through the diminishing process of administration, and especially when suit is brought by the distributees.—*Bethea v. McCall*, 5 Ala. 308; *Miller v. Eastman*, 11 Ala. 614; *Vanzant v. Morris*, 25 Ala. 285; *Marshall v. Crow*, 29 Ala. 278; *Carter v. Owens*, 41 Ala. 219; *Fretwell v. McLemore*, 52 Ala. 124; *Sullivan v. Lawler*, 72 Ala. 268; *Cooper v. Davidson*, 86 Ala. 367, 5 So. Rep. 650; *Wright v. Robinson*, 94 Ala. 479, 10 So. Rep. 319; *Teague v. Corbitt*, 57 Ala. 529.

The intestate of Bishop and Short (Burney) was a joint obligor on the bonds of Mayes' administrator, King. Their failure to give notice of their appointment to creditors makes them liable for whatever Burney, their intestate, would be liable for if living.—Code, §§ 2075, 2077. And suit may be brought against them any time within six years from date of their failure to give notice; and their sureties are also liable.—Code, § 2615. The sureties of King being jointly liable, and Bishop and Short having made themselves personally liable in the

stead of Burney by their wrongful act, the chancery court has complete authority to adjust the controversy and mould its decree so as to protect and preserve the rights of all parties.—*Ware v. Russell*, 70 Ala. 174; *Price v. Carney*, 75 Ala. 546. The complainants could not maintain a suit at law against Bishop and Short; this could be done only by an administrator *de bonis non* of Mayes' estate; and since the chancery court can do complete justice to all parties, and equitable relief being complainants' remedy, the court has jurisdiction also as to Bishop and Short.—*Ontario Bank v. Munford*, 5 N. Y. Ch. 767, (L. An. Ed.); *Morse v. Elmendorf*, Ib. 135; *Lenox v. Roberts*, 2 Wheat. 373; *Jones v. Newhall*, 15 Amer. Rep. 97. Before a court of equity will refuse to assume jurisdiction, it must appear that a legal remedy is in all respects as complete as equity.—*Fitzmaurice v. Mosier*, 9 Amer. St. Rep. 854. Courts of equity exercise a sound discretion as to whether there is a misjoinder of parties.—1 Dan. Ch. Pr. note 3, p. 303; *Fillmore v. Wells*, 3 Amer. St. Rep. 567.

Equitable jurisdiction is measured by the absence or existence of adequate remedies at law.—Pom. Eq. Jur. §§ 130, 132; 6 Amer. & Eng. Encyc. of Law, 692. The bill avers there is no administrator *de bonis non* of Mayes' estate, and equity always assumes jurisdiction when the remedy is complete and a multiplicity of suits would be avoided; either simultaneous against different persons, or successive against the same person.—1 Pom. Eq. Jur. § 139; *McHenry v. Hazard*, 45 N. Y. 580; *N. Y. & C. R. R. Co. v. Schuyler*, 17 N. Y. 592; *Third Ave. R. T. Co. v. Mayor*, 54 N. Y. 159; *Eldridge v. Hill*, 2 John. Ch. 281; *West v. Mayor*, 4 N. Y. Ch. An. 1081; *Oelrich v. Spain*, 15 Wall. 211, 229; *Woods v. Monroe*, 17 Mich. 238; *W. U. T. Co. v. Western & Atlantic R. R. Co.*, 91 U. S. 283, 291. If jurisdiction has properly attached, a court of equity will retain the case and settle matters which do not afford original jurisdiction.—6 Amer. & Eng. Encyc. of Law, pp. 692, 693; *Blakey v. Blakey*, 9 Ala. 391; *Pearson v. Darrington*, 21 Ala. 169; *Ober v. Galligar*, 93 U. S. 199, 208.

The probate court of Talladega county is in a county of the North-Eastern Chancery Division. The chancellor would have the same right to order the transmission of papers from the probate court of Talladega county to Vol. 101.

the chancery court of Clay county, as he would have to order their removal to the chancery court of Talladega county.—Code, § 649. Clay county is a part of the North-Eastern Chancery Division.

W. M. LACKEY, and C. C. WHITSON, *contra*.—Upon the face of the bill as amended, the claim upon which the suit is founded is barred by the statute of non-claim, as against the estates of James L. Barnhill, L. M. Burney and James F. Martin.—Code, § 2081; *Fretwell v. McLe-more*, 52 Ala. 124. The commission of the alleged devastavit by J. W. King, as administrator of Mayes' estate, set up in the bill, would constitute such a breach of his sureties' bond as to make it an accrued claim against the estates of such sureties, and put into operation the "running of the statute of non-claim."—*Glass v. Wolf*, 82 Ala. 281, 3 So. Rep. 11; *Taylor v. Robinson*, 69 Ala. 269; *McDowell v. Jones*, 58 Ala. 25; *Martin v. Ellerbe*, 70 Ala. 334.

It is not shown in the bill as amended what right or interest Mattie Page had in the claim upon which this action is founded, or what right she had to bring or maintain the suit in the chancery court of Clay county, which is set up as a sufficient presentation under the statute of non-claim in the amendment to the bill.—*McDowell v. Jones*, 58 Ala. 25; *Hallett v. Bank of Mobile*, 12 Ala. 193; *Cook v. Davis*, 12 Ala. 551; *Smith v. Fellows*, 58 Ala. 467; *Agnew v. Walden*, 84 Ala. 504, 4 So. Rep. 602. To constitute a sufficient presentation under the statute by suit, the suit must not only be commenced within the statutory period of eighteen months from the grant of letters, but its prosecution must be continued. If the suit be abandoned, or the plaintiff suffers a voluntary non-suit, it does not operate as a presentation of the claim upon which it is founded, nor prevent the bar of the statute.—*Floyd v. Clayton*, 67 Ala. 265; *Bigger v. Hutchins*, 2 Stewart 445; *Jones v. Lightfoot*, 10 Ala. 18; *Pipkin v. Hewlett*, 17 Ala. 291.

The suit alleged to have been brought by Mattie Page, in February, 1890, is the only presentation under the statute of non-claim that is alleged or relied on; and yet it is not averred what amount was claimed in such action, or that such suit furnished the defendants with a knowledge of the existence and nature of the claim and

the intent of those in interest to rely on and enforce it. Substantially all that is averred is that the claim was presented by such suit, which is a mere conclusion of the pleader.—*Smith v. Fellows*, 58 Ala. 472, and authorities cited; *McDowell v. Jones*, *supra*.

An administrator or the heirs at law of Sarah A. King, deceased, are necessary parties to the bill.—*Teague v. Corbett*, 57 Ala. 529; Story's Eq. Pl., § 89. *Parker v. Parker*, 100 Ala. 239. The interest of the estate of Sarah A. King can not properly be committed to an administrator *ad litem*, and this ground of demurrer to the bill as amended was properly sustained.—*Dooley v. Villalonga*, 61 Ala. 129; *Moore v. Alexander*, 81 Ala. 509, 8 So. Rep. 199. For a want of necessary parties the court will, *ex mero motu*, take notice of the defect.—*Watson v. Oates*, 58 Ala. 647; *Parker v. Parker*, 100 Ala. 239.

The complainants can not, in a bill to settle and distribute an estate, recover in the same suit a statutory penalty; upon the face of it, it is a misjoinder of parties defendant and renders the bill multifarious. It is equally clear that, if complainants have any right of action against John H. Short and W. T. Bishop, for a failure to advertise their appointment as administrators of Burney's estate, under section 2077 of the Code, their remedy is at law and not in equity.

Only the chancery court of the county (or chancery district) in which the administration is pending has jurisdiction of a bill filed for the sole purpose of the removal and settlement of the administration in chancery. James E. Mayes was an inhabitant of Talladega county at the time of his death (1862), and administration upon his estate was properly granted in such county.—Code of 1852, § 1667. The act of the General Assembly, "to form a new county, to be called the county of Clay from portions of Talladega and Randolph counties," approved Dec. 7, 1866, (Acts 1866-7, p. 92), makes no provision for the removal of pending administrations. Section 5 of such act relates solely to the transfer of pending suits, on the application of defendants. But even as to such suits the application for such removal had to be made within a reasonable time, and more than two years from the formation of a new county has been held to bar such right of removal.—*Ex parte Rhodes*, 43 Ala. 373. Where the legislature has made no provision, whatever, for the

removal of administrations out of the probate court of Talladega and into the probate court of Clay, the administration can not be removed into the chancery court of Clay.—*Lindsay's Heirs v. McCormack*, 2 A. K. Marshall 229; *Drake's Adm. v. Vaughn*, 6 J. J. Marshall 147; *State v. Jones*, 4 Halst'd (N. J.) 357.

HARALSON, J. —The commission of the alleged devastavit by J. W. King, as administrator of J. E. Mayes' estate, as set up in the bill, would constitute such a breach of his administration bond, as to make it an accrued claim against the estates of his sureties on his bond, and put into operation the running of the statute of non-claim.—*Glass v. Wolf's Admr.*, 82 Ala. 281, 3 So. Rep. 11; *Martin v. Ellerbe's Admr.*, 70 Ala. 326; *Taylor v. Robinson*, 69 Ala. 269; *McDowell v. Jones*, 58 Ala. 25.

2. The bill shows that James F. Martin, L. M. Bradley, Jos. D. McCann, Jas. L. Bunhill and Thos. Adams were the sureties of J. W. King, on his bond as administrator of the estate of said J. E. Mayes. All these sureties, as is shown, are dead, and their administrators, except the one of said Adams, are made parties defendant to the bill, sued, as stated, to require them to account for the alleged devastavit of said King, as administrator of said Mayes. Thos. Adams, as is shown, has been dead for many years, and one William Hamilton was appointed his executor by the probate court of Clay county, and his estate has been finally settled in said court several years ago. The dates of the appointment of the personal representatives of these several sureties on said administration bond were as follows: Henry A. Manning was appointed administrator of J. F. Martin on the 21st of November, 1884; William T. Bishop and John H. Short, of L. M. Burney, on the 29th June, 1888; Geo. W. Bartlett, as executor of Jas. L. Bunhill, on the 7th of December, 1889; and Thos. Northen, as administrator of Jos. D. McCann, on the 18th of September, 1890.

In the original bill as filed no presentment of the claim sued on in this action was averred to have been made to the personal representatives of these several sureties. The presentment was attempted to be shown by the amendment filed to the bill. For the greater certainty, and that we may not misinterpret the averments on which complainants rely, as showing a presentation of

this claim under the statute, we quote the language of the amended bill, as follows : "The complainants charge and aver, that the claim for which this suit was brought was, on the 8th day of February, 1890, duly and legally presented to John H. Short and W. T. Bishop, as administrators of L. M. Burney, deceased, and to Geo. W. Bartlett, as executor of Jas. L. Bunhill, deceased, by filing a bill in the chancery court of Clay county, Alabama, against them by Mattie Page, and on the 18th day of September, 1890, by amendment to the original bill, the other complainants presented their claim against defendants, and that complainants presented their claim to Thos. Northen, administrator of Jos. D. McCann, deceased, on the 21st day of July, 1891, by suing him in the chancery court of Clay county, Alabama. And complainants aver, that on the 25th day of September, 1891, the bill as originally filed in said case, together with the amendments thereto, was dismissed by the court, on motion of the defendants because there was a misjoinder of parties, in that, because the only party to the original bill of complaint had been stricken out by amendment to the bill, and, because of said amendment, there was an entire change of parties.

"Complainants further charge and aver, that said original bill and amendments thereto were exhibited in this court by those who had a legal right to present their claim to defendants, and that upon the dismissal of their said bill, to-wit, on the 25th of September, 1891, the said complainants or their legal representatives did, on the 26th of September, 1891, file the present bill to this court, seeking to enforce the collection of their said claims.

"Orators further charge and aver, that the reason that their claim was not presented to Jas. H. Short and Wm. T. Bishop, as administrators of L. M. Burney, within 18 months from the time they were appointed such administrators by the probate court of Clay county, Alabama, was because the said Short and Bishop did not give notice to creditors as required by law, to present their claims against the estate of the said L. M. Burney, deceased. And orators charge and aver. that by the failure of the said Short and Bishop to give such notice to the creditors, the said Short and Bishop make themselves personally liable to any creditor whose claim would have been good if

presented within 18 months from the date of their appointment.

"Complainants amend their bill by suing John H. Short and Wm. T. Bishop, individually, and so as to strike their names out as originally sued as administrators of L. M. Burney."

It will be observed, that the presentment of this claim is averred to have been made by the filing of two bills in the chancery court of Clay county, the first, on the 8th of February, 1890, by Mattie Page against John H. Short and Wm. T. Bishop, as administrators of L. M. Burney, and Geo. W. Bartlett, as executor of J. L. Bunhill, and by amendments thereto, filed on the 18th of September, 1890, by which complainants were made parties thereto. It will also be seen, that what right or interest said Mattie Page had in and to the claim upon which the present bill is filed, or what her right of action as set up in said bill as filed by her was, and her right to maintain said bill, are not averred. Neither is it shown what amount she and the other complainants, brought in by amendment, claimed in that suit, nor any facts informing defendants of the existence and nature of the claim and of the intention of those in interest to enforce it. Substantially, all that is averred is, that a claim, without describing its nature or amount, was presented in that suit, which is a mere conclusion of the pleader, not amounting to a presentation as required by statute.—*McDowell v. Jones*, 58 Ala. 25; *Smith v. Fellows*, *Ib.* 467; *Bibb v. Mitchell*, *Ib.* 657; *Floyd v. Clayton*, 67 Ala. 265; *Agnew v. Walden*, 84 Ala. 502, 4 So. Rep. 602.

The reference to the second bill, filed on 21st July, 1891, by said Mattie Page against Thos. Northen, as administrator, which is alleged to have been dismissed on the 25th September, 1891, is just as defective as an allegation of presentment, but that defect is cured by the further allegations, that on the 26th of September, 1891, the present bill was filed against said administrator and others, which date is within the 18 months after his appointment, and the claim is sufficiently described in the present bill.

3. The demurrer is confessed as to John H. Short and Wm. T. Bishop, as administrators of L. M. Burney, and by amendment, their names, as such, were stricken out of the bill, and added as individuals, so that the suit

should stand against them in their individual and not in their representative capacity. In this the bill was made multifarious. The claim against them was a personal penalty alleged to have been incurred by them, for which they are answerable at law, and which is a separate and distinct matter, having no necessary connection with the objects of this bill.—*Martin v. Ellerbe*, 70 Ala. 326, 335; *Hardin v. Swoope*, 47 Ala. 273; *Clay v. Gurley*, 62 Ala. 14; *Conner v. Smith*, 74 Ala. 115, 121.

4. Of Sarah King it is averred, that she was one of the several and only heirs at law of said J. E. Mayes at his death; that she died in 1884, and that her estate is interested in this suit, entitled to whatever amount she would receive, if living, out of the estate of Mayes, but neither her administrator, nor her heirs at law are joined as complainants or defendants. The bill also fails to aver that there is no administrator or executor of her estate, or whether or not she left children. It was subject to demurrer on this account, and was not a case made out under the statute for the appointment of an administrator *ad litem*.—Code, § 2283; *Fretwell v. McLemore*, 52 Ala. 124; *Sullivan v. Lawler*, 72 Ala. 68, 71.

5. Independent of any of the foregoing principles, there remains a question which determines the fate of the present bill. The county of Clay was formed out of portions of Talladega and Randolph counties, by act of the General Assembly, adopted December 7, 1866. Acts 1866-67, p. 92. The legislature, in the adoption of that act, made no provision concerning the administrations of estates, pending in the probate courts of the counties of Talladega and Randolph, at or after the formation of the new county. It was its exclusive province to do so. In the absence of any such provisions, such administrations continued in the parent counties, unaffected by the formation of the new county.—*Vanhoose v. Bush*, 54 Ala. 342; *Wright v. Ware*, 50 Ala. 549; *Coltart v. Allen*, 40 Ala. 155. The jurisdiction of the old counties in which suits were pending was not ousted in the formation of the new county, either as to the persons or subject matter; and this principle was as applicable to administrations pending in the probate courts of these counties, as to suits in any of their courts.—4 Am. & Eng. Encyc. of Law, 335 *Lindsay v. McCormack*, 2 A. K. Marsh. 229; *Drake's Admr. v. Vaughan*, 6 J. J. Marsh. 147; *Arnold v. Styles*, 2 Black. (Ind.) 391; 5 Watts (Pa.) 87.

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Mayes resided and died in Talladega county in 1862, and said King was appointed his administrator, by the probate court of that county, in that year. If for any allowable reason, it became necessary or proper to transfer the settlement of the administration of that estate from the probate court of Talladega county into a court of equity, the chancery court of Talladega, in whose probate court said administration was pending, and not the chancery court of Clay county, had jurisdiction; and was the one into which such settlement ought to have been removed. In the absence of legislation authorizing it, the chancery court of Clay had no more jurisdiction of the administration and settlement of the estate, than any other chancery court of the State.

6. The 5th section of said act makes provision for the transfer of suits pending against defendants, from the courts of the old counties into the new one, and has no reference to administrations pending in the probate courts of the older counties. Indeed, this provision is to be construed as the expression of a legislative intent that such administrations were not to be removed into the probate court of Clay.

From what has been said, it follows, that the chancery court of Clay county has no jurisdiction of this cause, and a decree will be here entered dismissing the bill.

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Action of Detinue by Mortgagee against Mortgagor

1. *Unauthorized alteration of written instrument.*—Any material alteration of a written instrument after its execution, without the maker's consent, avoids it, and discharges the maker from all obligations depending upon it.

2. *Same; filling blanks in excess of authority.*—Where one of the parties to a written instrument, who is authorized to fill a blank in the instrument in a certain way, or by the insertion of a certain amount, inserts in the blank matters or an amount not covered by the authorization, such alteration is material, and vitiates the instrument as between the original parties thereto, although the alteration was not made with a fraudulent intent.

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APPEAL from Circuit Court of Marshall.

Tried before the Hon. JOHN B. TALLY.

John H. Sneed sued Andrew H. Green in detinue for the possession of certain personal property, to which he claimed title under and by virtue of a mortgage executed by the defendant, the law day of which had passed. The defendant's testimony showed that the plaintiff had filled a blank in the mortgage by inserting a larger amount than that agreed on by the parties and contemplated by the defendant, when he authorized the plaintiff to fill in the blank. On the trial of the cause there was a verdict for the defendant; but on motion of the plaintiff for a new trial, the court set aside the judgment, and granted a new trial, on the ground that the verdict was contrary to the evidence.

To the ruling of the court annulling the judgment and granting a new trial the defendant duly excepted, and now brings this appeal, and assigns such ruling as error.

BROWN & STREET, for appellant.—(1.) A material alteration of an instrument to the prejudice of the obligor avoids it unless done with his express or implied consent.—*Glover v. Robbins*, 49 Ala. 219; *Lamar v. Brown*, 56 Ala. 157; *Toomer v. Rutland*, 57 Ala. 379; 1 Rand. Com. Paper, § 187. (2.) The same rule applies to the filling of blanks in a manner not authorized by the maker.—*Toomer v. Rutland*, 57 Ala. 379; 1 Rand. Com. Paper, §§ 181-187. (3.) The motive with which the change is made or the unauthorized filling of the blanks done is immaterial. It is not because such is a fraud *per se*, but because a contrary rule would open too great a door for fraud.—*Toomer v. Rutland*, 57 Ala. 379; *Glover v. Robbins*, 49 Ala. 219.

LUSK & BELL, *contra*.

McCLELLAN, J.—The evidence is free from conflict that Sneed was authorized to fill the blank left in the mortgage executed by Green to him, by inserting therein the amount of the former's debt against the latter, after deducting therefrom the proceeds of certain two bales of cotton, and adding thereto the costs of a former suit between the parties. There is conflict in the testimony as to whether the mortgagee also had authority to add

to the debt and costs attorney's fees incurred by him in the former suit, and insert the aggregate of all these items in the blank space left in the instrument. For the purposes of this appeal, however, it will be conceded that the mortgagee was authorized to include and insert as a part of the amount intended to be secured the sum paid his attorney for services in the previous litigation. A satisfying preponderance of the evidence fixes the amount of the debt balance at one hundred and twenty-five (\$125) dollars. It was shown without conflict that the attorney's fee in question was \$18, and the costs of the former suit amounted to \$8.65. The total of these sums is one hundred, fifty-one and 65-100 dollars. The balance of the debt which the mortgagee *claimed* to be due was \$138.24. Adding to this the attorney's fee and court costs, the total is \$164.89. No phase or tendency of the evidence shows a greater total than this, and this sum, \$164.89, on the aspects of the testimony most favorable to the plaintiff, marks the extremest limit of the amount he was authorized to insert in the instrument. The amount actually inserted by or for him was \$167.10; \$2.21 in excess of his authority, if the evidence in his own behalf is to be taken as true, and \$15.45 in excess of the amount which, according to a preponderance of the testimony, he was authorized to insert in the blank.

The general proposition that any material alteration of an instrument after its execution, without the maker's consent, avoids it and discharges him from all obligation depending upon it is not controverted in this case.—*Montgomery v. Crossthwait*, 90 Ala. 553, 8 So. Rep. 498; *Anderson v. Bellinger*, 87 Ala. 334, 6 So. Rep. 82. Nor can it be doubted in principle or upon authority that a material and, as between the original parties to the instrument, vitiating alteration may consist in the filling of a blank, which the promisee is authorized to fill in a certain way, by the insertion therein of matter not covered by the authorization.—1 Am. & Eng. Encyc. of Law, p. 518; *Toomer v. Rutland*, 57 Ala. 379. And as any change of the amount intended to be evidenced by a writing, whereby it becomes nominally a promise to pay either a greater or less sum than that originally expressed is a material, and, therefore, vitiating alteration (1 Amer. & Eng. Encyc. of Law, p. 508), so, in princi-

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ple, where the amount is left blank and the promisee is authorized to insert a given sum, or the true aggregate of several specified items, the respective amounts of which are fixed but not at the time known to the parties, and he inserts a different amount, as here, in excess of the true aggregate of all the items intended to be embraced, the like vitiating consequences must ensue.

The court below confined the application of these principles to cases in which the alteration is made with a fraudulent intent, and, finding no such intent to have actuated the plaintiff in this instance, held that the mortgage was a valid security for the amount really due, notwithstanding a different and excessive amount had been inserted in it. The distinction is not well taken. The question of intent is not involved. As is well said by counsel: "The motive with which the change is made, or the unauthorized filling of the blank is done, is not material. It is not because the thing done is actual fraud, but because a contrary rule would open too great a door for fraud," and because, we may add, that the alteration changes the legal identity of the paper and causes it to speak a language differing in legal effect from that which it originally spoke, a result which would ensue however pure the intent with which the alteration was made, that the law holds the instrument, as between the original parties and those nominally acquiring rights under it with notice of the alteration, to be null and void for all purposes.—1 Am. & Eng. Encyc. of Law, pp. 518, 520; *Glover v. Robbins*, 49 Ala. 219; *Toomer v. Rutland*, 57 Ala. 379; *Montgomery v. Crossthwait*, 90 Ala. 573; 8 So. Rep. 498.

Where the alteration or unauthorized filling of blanks is free from all covinous intent, the result of an honest mistake or miscalculation, it may be that the promisee can recover on the original consideration: he certainly could not do even this if he made or consented to the change for any fraudulent purpose—1 Amer. & Eng. Encyc. of Law, p. 526; *White v. Haas*, 32 Ala. 430—but here the action is not on the original consideration for which the mortgage was executed, but the right of recovery, the title asserted by the plaintiff in this action of detinue, depends upon the validity of the paper itself, which in legal contemplation ceased to be the instrument which the defendant executed the moment it was

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altered as shown by the uncontroverted evidence, and its emasculation is none the less complete because of the absence of evil intent on the part of the plaintiff in committing the act which destroyed it.

The evidence not only authorized the jury to find for the defendant, but it showed, without conflict or room for adverse inference, that the muniment of title upon which the plaintiff relied for recovery was utterly infirm and invalid, and hence the jury could not have found other than they did under the law of the case.

It is clear that the trial court erred in setting aside the verdict and granting a new trial. The judgment to that effect is reversed and annulled, the motion for new trial is overruled and denied, and the verdict and judgment for defendant as returned and rendered in the court below is left in full force.

Reversed and rendered.

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Bill in Equity to set aside as Fraudulent Conveyances by Insolvent Debtor.

101	209
125	377
101	209
134	589
101	209
142	490

1. *Bill to set aside conveyances as fraudulent; denials of the answer.*—

An answer to a bill of complaint that contains a mere general denial of the matters charged is not sufficient; and in response to a bill filed to set aside conveyances as fraudulent, the answer must specifically deny the allegations that charge material matters, *prima facie* within the knowledge of defendants, which render the conveyances fraudulent and void, or such allegations will be considered as admitted and true, entitling the complainant to the relief sought.

2. *Fraudulent conveyances; evidence on bill filed to set them aside.*—

Where an insolvent debtor conveys lands to some of his creditors by a deed absolute in form, in alleged payment of a debt greatly less than the value of the lands, and the creditors subsequently convey the same lands to the wife of the debtor upon a recited cash consideration, greatly less than the value of the lands, and at the time of the latter conveyance the said creditors accounted to the debtor for the rents collected and taxes paid by them pending their possession, and offers to purchase said lands were referred to the debtor, who continuously claimed the ownership thereof, the deed to the creditors will be construed a mortgage, and upon a bill filed by other creditors

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of the said debtor for that purpose, both of the conveyances will be set aside as fraudulent and void.

3. *Same; variance between proof and allegations.*—When, in a bill filed to set aside as fraudulent a conveyance from an insolvent debtor to certain creditors and a conveyance from the said creditors to the wife of the debtor, the bill averred that the debtor owned the lands in fee, and the proof showed that it was owned jointly by the said debtor and one who was not a party to the suit, there is no variance between the allegations and proof, so far as the parties to the suit are concerned, since the wife did not claim title from the joint owners of the land, but derived her title from her husband's grantees.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. W. H. TAYLOR.

The bill in this case was filed on February 24, 1892, by O. W. Barrow, as surviving partner of the firm of O. W. Barrow & Bro., and several other creditors of Bernard Moog, against the said Bernard Moog, Delphine Moog, his wife, and Frank Hemly, the surviving partner of the firm of Haas & Hemly. The bill averred that the said Bernard Moog, while indebted to the complainants and other creditors, and being insolvent, on January 10, 1885, conveyed by a deed, absolute in form, certain lands to the firm of Haas & Hemly, the consideration for said deed being an indebtedness by Moog to Haas & Hemly; that subsequently, in compliance with an agreement made at the time of the aforementioned deed, the said Haas & Hemly conveyed the same lands to Delphine Moog, the wife of Bernard Moog, upon the recited consideration of \$500, which consideration was greatly less than the value of the lands; that while the deed from B. Moog to Haas & Hemly showed on its face that it was absolute, it was, in fact, intended as a mortgage to the said Haas & Hemly, to secure the payment of a debt from the said Moog to them, the debt being greatly less than the value of the property, and that upon the payment by the said Moog of the alleged indebtedness to Haas & Hemly, they, in compliance with the agreement made with said Moog, conveyed the property to his wife.

The prayer of the bill was that the deed of B. Moog to Haas & Hemly and the deed of Haas & Hemly to Delphine Moog be set aside and cancelled as fraudulent against the complainants as existing creditors of the said Bernard Moog. The other facts of the case are sufficiently stated in the opinion.

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Upon the submission of the cause, upon the pleadings and proof, the chancellor granted the relief prayed for, and decreed that the said deeds be set aside and annulled and held for naught. The defendants appeal, and assign this decree as error

HENRY CHAMBERLAIN, for appellants.—There is a fatal variance between the allegations of the bill and the proof. The proof shows that the title to the property was in the firm of A. & B. Moog, and not in Bernard Moog as alleged in the bill.—*Floyd v. Ritter*, 56 Ala. 356; *Webb v. Cruwford*, 77 Ala. 440; 3 Brick. Dig. 402, § 571.

McINTOSH & RICH, *contra*.—There was no variance between the proof and the allegations of the bill, so far as the parties to the present suit were concerned.—*Campbell v. Lunsford*, 83 Ala. 512; 3 So. Rep. 522; *Smith v. Alexander*, 87 Ala. 387, 6 So. Rep. 51; *Kimbrell v. Rogers*, 90 Ala. 339; 7 So. Rep. 241; 3 Brick. Dig. 405, § 20.

COLEMAN, J.—Barrow *et al.*, creditors of Bernard Moog, filed this bill attacking certain conveyances of land as fraudulent and void, made by Bernard Moog and wife to Haas & Hemly, and subsequently by Haas & Hemly to the wife of Bernard Moog. The deeds are in terms absolute. The consideration, as expressed in the conveyance from Moog and wife to Haas & Hemly, was the payment of a past debt due them by Moog, and that expressed in the conveyance to the wife of Moog was a cash consideration of five hundred dollars. The bill shows that complainants were creditors at the time of, and prior to, the execution of these conveyances, and avers that the deed to Haas & Hemly was intended to operate only as a mortgage to secure the indebtedness of Moog to Haas & Hemly, and that the conveyance to the wife of Moog was intended as a fraud; that the money expressed as the consideration was furnished by Moog himself, and was in fact payment of the debt, for which the conveyance was intended to operate as a mortgage security.

The answer consists of only two paragraphs to these important allegations of the bill. The first is: "That they and each of them deny the allegations and charges

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set forth in each paragraph of complainant's said bill of complaint, from paragraph one to paragraph six, both inclusive." This is the only response of Bernard Moog to the bill. By a second paragraph the wife answers that she purchased the property "in good faith and parted with value by paying money therefor, without notice of complainants' alleged equity." The charge of complainants that her husband conducted the entire transaction, and furnished to her the money, and that the payment was in satisfaction of the mortgage debt is not denied or referred to in her answer.

An answer is not sufficient that states a general denial of the matters charged. There should be a clear and distinct response to each averment of the bill.—Story Eq. Pl., § 852; Daniels Ch. Pr. § 844; *Savage v. Benham*, 17 Ala. 131. When a material matter is charged in the bill, which *prima facie* is within the knowledge of the defendant and he fails to deny it, it must be considered as admitted.—*Smiley v. Siler*, 35 Ala. 88; *Grady v. Robinson*, 28 Ala. 289.

But aside from these principles the proof is clear, that the deed to Haas & Hemly was intended to operate only as a mortgage. The grantee Hemly testifies, that on settlement with Moog, at the time of the reconveyance to Moog and wife, he accounted for all the rents collected from the land, and charged Moog with the taxes, that more than once, persons offered to purchase the land from him, and on each occasion he referred the proposition to Moog, who declined to accept the offer, and that Moog always as to him claimed the land, subject only to the payment of the debt due Haas & Hemly. The real value of the land, shown to be much more than double the amount of the consideration, is competent evidence to be considered in this connection. Neither Moog nor his wife were examined as witnesses in the case. We do not doubt the correctness of the conclusion of the chancellor from the facts introduced in evidence.

It is insisted that there is a variance in the *probata* and *allegata*, which is fatal to any relief, in this, that the bill charges that Moog the defendant owned the land in fee, and the proof shows, that the fee was in A. & B. Moog, and we are referred to the cases of *Floyd v. Ritter*, 56 Ala. 356, and *Webb v. Crawford*, 77 Ala. 440, in support of the contention. Neither of these cases have any ap-

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plication to the question under consideration. Moog conveyed by deed with warranties the whole land to Haas & Hemly. Mrs. Moog claims only under title derived from her husband through Haas & Hemly. A. Moog is not a party to the bill. Mrs. Moog does not rely upon title from A. & B. Moog, but title from Haas & Hemly, who acquired title from B. Moog only, the husband. This is the title that is attacked as fraudulent. This is the title that Mrs. Moog is called upon to defend. There is no variance in the *allegata* and *probata* so far as the parties to the bill are concerned. There is no error in the record.

Affirmed.

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Statutory Claim Suit.

101	213
104	564
101	213
0113	576

1. *Evidence as to value of goods in claim suit.*—In a statutory claim suit, where the sale of goods by an insolvent debtor to the claimant, in payment of an alleged indebtedness, is assailed on the ground of undervaluation, the amount the claimant received for such goods at a private sale subsequently made to third parties, is not legal evidence against the attacking creditor of the value of the goods; and questions seeking to elicit such evidence should not be allowed.

2. *Declarations against the interest of claimant; when incompetent.* In a statutory claim suit, evidence of declarations made by the grantor of the claimant against the interest of the latter, when he was not present to deny or explain them, is incompetent, and its admission is error.

3. *Indefinite exceptions; not considered on appeal.*—It is the duty of the party excepting to the ruling of the trial court, to make clear to the appellate court the error insisted on; and if a question asked a witness is too indefinite to enable the court of appeal to determine whether it sought to elicit legal or illegal evidence, the assignments of error based on an exception to the ruling of the trial court on such question will not be considered.

4. *Indefinite assignments of error; not considered on appeal.*—An assignment of error that "the court erred in sustaining claimant's objections to questions showing the fraudulent intent of [the debtor] in disposing of goods. Pages 62 and 63," when there are a number of questions on the pages referred to, to which the court sustained objec-

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tions, is too indefinite to be reviewed by this court; since such assignment of error does not point out to the court the questions supposed to show such intent.

5. *Charge as to fraudulent conveyance.*—In a statutory claim suit, where the sale to the claimant is attacked as fraudulent, a charge which instructs the jury that they must find a verdict for the claimant, if the evidence in the cause shows an honest intent on the part of the claimant (grantee) to secure the payment of a *bona fide* indebtedness, and that there was no reservation of benefit to the debtors in the purchase of said goods from them, and that the claimant received no more goods than was sufficient to pay his debts, asserts a correct proposition of law, and is properly given.

6. *Fraudulent conveyance; when more goods delivered than mentioned in bill of sale.*—In a statutory claim suit, where an attaching creditor attacks as fraudulent the sale of the attached property by the debtor to the claimant, if it is shown that there were delivered to the claimant more goods than were mentioned in the bill of sale, the transaction is fraudulent as to the other creditors of the debtor, and the entire sale should be set aside as fraudulent and void.

APPEAL from the Circuit Court of Dallas.

Tried before the HON. JOHN MOORE.

This was a statutory claim suit instituted by Charles L. Rodenberg claiming a certain portion of a stock of goods, which had been levied on under an attachment issued at the instance of H. B. Claflin Co. against F. S. & H. Rosenberg.

The evidence, as shown by the bill of exceptions, tends to show that F. S. & H. Rosenberg, who were doing a mercantile business in Selma, Ala., were, on January 20, 1891, indebted to H. B. Claflin Co. in the sum of \$6,203.61. On the evening of January 20, 1891, they sold a part of their stock of goods to Charles L. Rodenberg in satisfaction of an indebtedness of \$1,500. These goods were sold and packed in boxes and a trunk between 7 and 9 o'clock that night, and were left in the store. At half past 10 o'clock the same night F. S. & H. Rosenberg made an assignment for the benefit of their creditors to one Rothchild, and at one o'clock on the same night plaintiff sued out and had levied an attachment on all of the goods in the store of F. S. & H. Rosenberg, including these goods packed in boxes and in the trunk, which had been sold to Charles L. Rodenberg. On the next morning the said Charles L. Rodenberg demanded of the sheriff the goods which he had bought. Upon the refusal of the sheriff to surrender the

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said goods, said Charles L. Rodenberg made the necessary affidavit, and gave bond in double the appraised value of the goods, and instituted a claim suit for said goods, as provided by the statute.

The claimant introduced in evidence a bill of sale from F. S. & H. Rosenberg for the goods purchased, to which bill of sale was attached an itemized statement of the goods, marked "Schedule A." According to this itemized statement the goods thus sold to the claimant amounted to \$1,603.45. At the bottom of this statement there was a receipt of Charles L. Rodenberg, acknowledging payment in full of the indebtedness of F. S. & H. Rosenberg to him. The evidence for the plaintiff tended to show that there was attached to the same bill of sale another statement called "Schedule A, continued," amounting to \$605.02, at the bottom of which payment in full was acknowledged by Charles L. Rodenberg. There was also evidence introduced in behalf of the plaintiff that there were articles of embroideries and table napkins, varying in value, according to the testimony, from \$200 to \$600, which were delivered to the claimant, but which were not included in these itemized statements. The claimant himself testified that in the trunk there were some articles that were not included in the itemized statements; and, also, that there were some articles included in the statement, which were not delivered to him.

The evidence of the claimant further showed that all of the goods he received from F. S. & H. Rosenberg were sold by him to one Jack Holtzman and Oberndorf & Ullman; that Oberndorf & Ullman paid the claimant \$1,250 for the goods they bought, which amount was 60 per cent. of the New York cost of the goods at the time of the purchase on March 1, 1891; and that Holtzman paid something over \$100 for the goods he purchased.

Upon re-direct examination of the claimant he was asked, "What was the amount received by you for all the goods sold to Jack Holtzman?" and "What amount did you receive for all the goods you sold to Oberndorf & Ullman?" The plaintiff objected to each of these questions, and separately excepted to the court's overruling its objections to each of them.

On the examination of Robt. Kennedy, after his hav-

ing testified that he was the deputy sheriff who levied the attachment at the suit of Claflin & Co. against F. S. & H. Rosenberg, and that he delivered the goods claimed by the claimant to him, he was asked on cross-examination, "What was the amount of the H. B. Claflin Co.'s debt, claimed when levy was made?" The plaintiff objected to this question, and duly excepted to the court's overruling its objection.

Upon the introduction by the plaintiff of J. I. Bizzell, he testified that he was in the employ of the defendants in attachment, and assisted in packing the goods sold to Chas. L. Rodenberg in the boxes and trunk, and that when he commenced to put up the goods, F. S. Rosenberg told him to value them, but that after valuing a few of the goods, F. S. Rosenberg stopped him, saying he put too high a valuation on them. This witness was asked by the plaintiff, "If Fred S. Rosenberg, while they were selecting and packing the goods, told him, witness, that claimant had agreed to receive goods for him?" The court sustained the claimant's objection to this question, and the plaintiff duly excepted. The plaintiff then asked the witness, "If he knew of Fred S. Rosenberg trying to get the claimant to receive goods for him, the said F. S. Rosenberg?" The claimant objected to this question, the court sustained the objection and plaintiff duly excepted. The plaintiff then offered to prove by said witness "that after the packing of the boxes, F. S. Rosenberg put in his pockets a number of bill heads," but claimant objected to this evidence, the court sustained the objection, and the plaintiff excepted. There were several other exceptions reserved by the plaintiff to the court's sustaining the claimant's objections to the evidence sought to be introduced by this witness; but the assignments of error to these rulings render it unnecessary to notice them in detail. This assignment of error is in the following language: "The court erred in sustaining claimant's objection to questions showing the fraudulent intent of F. S. Rosenberg in disposing of goods. Pages 62 and 63."

Upon the introduction of all the evidence the court, at the request of the claimant, gave the following written charges to the jury, to the giving of each of which the plaintiff separately excepted: (1.) "The court never strives to force conclusions of fraud, and if all the facts

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in evidence in this case are susceptible of an honest intent and without fraud so far as Rodenberg (the claimant) is concerned, and that there was no reservation of benefit to F. S. & H. Rosenberg in the purchase of said goods, and that his was a *bona fide* debt, and that he received no more goods than were sufficient to pay his debt, then you will find a verdict for claimant." (2.) "If the jury believe from the evidence that Rodenberg received other goods than those named in his bill of sale from F. S. & H. Rosenberg, yet that would not invalidate the sale to him, if the jury believe the purchase by him was fair and honest, and a reasonably fair sum was paid for the goods."

There was judgment for the claimant. The plaintiff appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

PETTUS & PETTUS, and DAWSON & PITTS, for appellants.

G. A. ROBBINS, and CRAIG & CRAIG, *contra*.

HEAD, J.—The first and second assignments of error must be sustained. The sale of the goods by F. S. and H. Rosenberg to claimant was being assailed by the plaintiff on the ground of undervaluation. What claimant received for the goods, on private sales made by him afterwards to third parties, can not be legal evidence, against the plaintiff, of their value. Such sales afford no test of value. To allow such evidence would be to allow a party to make evidence for himself.

The question asked Kennedy, "What was the amount of the H. B. Claflin Company's debt, claimed when the levy was made?" seems entirely immaterial and useless, and, no doubt, will not be asked again on another trial.

The matters proposed to be proved by the witness, Bizzell, covered by the fourth and seventh assignments of error, were not competent evidence against the claimant. They are declarations of Fred. S. Rosenberg against the interest of claimant, when the latter was not present to deny or explain them.

It is the duty of a party excepting to make clear to this court the error insisted on. The question to witness, Bizzell, "If he knew of Fred. S. Rosenberg trying to get claimant to receive goods for him, the said Fred.

S. Rosenberg?" is too indefinite to enable us to determine whether it sought to elicit legal evidence or not.

The sixth assignment of error is too general and indefinite. There are a number of questions covered by pages 62 and 63 of the record, to which the court sustained objections. We are asked by this assignment to consider those "showing the fraudulent intent of F. S. Rosenberg in disposing of goods." The appellant should have pointed out to us the questions supposed to show such intent.

The first charge given at the instance of claimant is free from error. It but asserts the oft repeated doctrine of this court in reference to sales of goods in payment of existing debts.

There is evidence tending to show that there were goods in the boxes and trunk delivered to claimant which were not mentioned in the bill of sale which was executed by the Rosenbergs to claimant, at the time of the purchase, on the 20th day of January, 1891. The title to those goods, however, is not involved in the issue tried in this cause. The only goods claimed by the claimant, and for which he gave bond to try the right of property in, are those mentioned and described in the schedule to the bill of sale. But this feature of the transaction, nevertheless, raises an important inquiry touching the *bona fides* and validity of the sale. The bill of sale, which is set out in the record, has its well defined legal effect, which could not be altered or varied by any other agreement, express or implied, made at the time and resting in parol. Its effect is that the Rosenbergs sold to claimant the goods mentioned therein, and no other, in full payment and discharge of the entire indebtedness owing him by them; so that the moment the bill of sale was executed and delivered, that indebtedness was discharged by the transfer of the goods therein conveyed. It matters not that those goods may have been worth less than the indebtedness, for by the contract of the parties the transfer of them was accepted in full payment. The debt was cancelled as completely as if it had been paid in cash. That contract, the moment it was executed, resulting, as we have seen, in the cancellation of the indebtedness, became irrevocable and unalterable, as against the other creditors of the Rosenbergs. They could not then or thereafter lawfully deliver other goods

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to the claimant in payment of that indebtedness; and if they did add to the goods mentioned in the bill of sale, other goods of material value, and deliver the same to the claimant, as and for payment of the said indebtedness; and if the claimant knew of such unlawful delivery, or afterwards ratified it by disposing of the goods so unlawfully delivered, as his own, the transaction was a fraud upon the other creditors which authorized them to set aside the sale, as to all the goods. Such a transaction is nothing less than a demonstration that the parties applied more of a debtor's goods in alleged payment of his debt than by law they were entitled to do, as against the rights of other creditors. It was, in effect, an attempt to change the terms of the written contract, revive the debt and apply more goods to its payment; and all occurred at one and the same time and as parts of one transaction. This they could not lawfully do. If done, its effect was to hinder, delay and defraud the other creditors, and the title of the claimant can not be sustained. The second charge, therefore, given at the request of the claimant ought to have been refused.

For the errors mentioned, the judgment is reversed and the cause remanded.

Reversed and remanded.

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116	515

Action against Railroad Company to recover Damages for Killing Child.

1. *Bill of exceptions; return to certiorari.*—Where there is a difference between a bill of exceptions sent up as a return to a writ of *certiorari* and the transcript of the cause as originally filed, the former must be regarded as the true and correct record.

2. *Same; document or paper made part thereof by reference.*—When a document or paper is sought to be made a part of a bill of exceptions by reference and without copying it, it must be so accurately described by identifying features that the transcribing officer can, unaided by memory, readily and with certainty determine what document or paper is referred to, without room for mistake.

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3. *Same*.—Where, in a file of papers in a cause there is a showing for a continuance on account of the absence of a witness, Hickman, which showing contains the title of the cause, a statement of the reasons of the witness's absence, of what he would testify if present, and it does not appear that there was any other witness in the cause by the name of Hickman, the clerk properly fills a blank left in a bill of exceptions by copying this showing therein immediately after the statement and direction that "the defendant then offered the admissions of what the witness, Hickman and others would swear if present. (These admissions are with the file of papers in the circuit clerk's office, and the clerk will set them out.)" By such reference and direction the paper containing the showing was sufficiently identified to leave no room for mistake.

4. *Same; charges copied by reference*.—Where a bill of exceptions recited that the court gave the following written charges at request of plaintiff, to the giving of each of which defendant "made separate objection, * * * and the clerk will set out each of said charges;" and that defendant requested the court to give the following written instructions to the jury, each of which the court refused to give, to which refusal defendant made separate exception, and "the clerk will here set out said charges," the clerk properly copied in the transcript all the charges asked by plaintiff and defendant on which were written the words "given" and "refused" and the signature of the presiding judge in the latter's handwriting. Such charges were sufficiently identified, since under the statute (Code, §2756), they became a part of the record when thus endorsed by the presiding judge.

5. *Parent and child; contributory negligence*.—A parent who lives within 50 feet of a railroad, along which trains pass several times a day, and who permits his child of tender years to play by itself in his yard, with no one to attend or nurse it and keep it from going upon the track of the railroad, when he knows a train is soon to pass, is guilty of such negligence as will preclude him from recovering damages from the railroad company for killing his child which had gone upon its track, unless the railroad company is guilty of more than simple negligence.

6. *Negligence; when question for the jury*.—In an action against a railroad company by parent for alleged negligent killing of his child, the question whether the engineer on the train causing the injury promptly used all available appliances, after seeing the child on the track, to stop the train before reaching it, is one for the jury, when the evidence is in conflict, or furnishes ground for conflicting inferences.

7. *Action against railroad company for negligent killing; when special plea sets up complete defense*.—In an action by parent against a railroad company for alleged negligent killing of his child, a complete defense is set up by a special plea which avers that the accident did not occur at a public crossing, that the engineer in charge of the locomotive at the time of the injury was a skillful and careful man, who was, at the time of and before the accident, keeping a vigilant and proper lookout,

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and doing all things required by law to avoid an injury to person or property, that the engine was supplied with all the improvements and appliances to secure safety in its operation and to avoid injury, that the cars of the train had all necessary appliances, and were manned with a sufficient number of skillful and careful brakemen, and that the child could not, by proper and vigilant lookout, have been seen until it came upon the track so suddenly and in such close proximity to the engine that the employment of all means known to skillful and careful engineers could not have avoided the injury.

8. *Same.*—In an action against a railroad company for killing plaintiff's child, where one count of the complaint assigns as the actionable negligence that the engineer of the defendant did not use all the means within his power, known to skillful and careful engineers, to stop the train after the discovery of the child upon the track, a plea to such count that avers that the child came upon the track so suddenly and in such close proximity to the engine that the employment of all means in the power of the engineer, known to careful and skillful engineers, could not have avoided the injury, that the engine and cars were supplied with all necessary improvements and machinery and were sufficiently manned, and that defendant's employés were, at the time, keeping a vigilant lookout and could not have discovered the child before it came upon the track, presents a complete defense, and is not demurrable.

9. *Same.*—Where, in such action, the negligence complained of in one count was that the defendant failed to provide proper brakes and appliances for stopping the train, a complete defense is presented by a plea that avers that, at the time of the accident, the engine and cars had all the appliances and machinery known to skillful engineers and railroad operators, and were properly manned, that the child was discovered as soon as possible while keeping a vigilant lookout, and that every thing in the power of skillful engineers and brakemen was done to avoid the injury after the child was discovered.

10. *Same.*—In an action by a parent for the alleged negligent killing of his child, where one of the counts of the complaint bases the actionable negligence of the defendant on the failure of the engineer to blow his whistle or ring the bell before entering or leaving a station on the road of the defendant, a quarter of a mile from the place of the accident, no defense to such count is presented by pleas, which aver that the child came on the track in such close proximity to the engine that the injury could not have been avoided by the employment of all means in the power of the engineer, although the engine and train had all necessary appliances known to skillful engineers and railroad operators, were properly manned, and every thing possible was done to avoid the injury after the child was discovered.

11. *Same.*—Such pleas constitute a sufficient answer to a count in the complaint which avers "that said killing was caused by the negligence of the defendant's employés in the management or running of said train of cars."

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12. *Error without injury; benefit of defense under general issue.*—Although the court may have committed error in sustaining demurrers to a special plea, it is error without injury, if the defendant had the benefit of the same facts as a defense under the plea of the general issue.

13. *Argumentative charges.*—Argumentative charges should be refused; but the giving of such charges is not reversible error.

14. *Charges to the jury.*—In an action by a parent against a railroad company for killing his child, if based on the tendency of the evidence adduced, it is a proper instruction to the jury to charge them that, "If the engineer did all in his power to avert the accident, but any one of the brakemen was negligent in the discharge of his duties, then the negligence of such brakeman is by law attributed to defendant; and if the jury further find that such negligence proximately caused the injury complained of, then the jury should find a verdict for plaintiff, unless they further find that the plaintiff has been guilty of contributory negligence."

15. *General affirmative charge.*—General affirmative charges should never be given when there is conflict in the evidence.

16. *Charge defining negligence.*—In an action against a railroad company for alleged negligent killing of plaintiff's child, a charge that defines negligence as consisting "either in doing what a man of ordinary intelligence, care and prudence ought not to do, or in omitting to do what a man of ordinary intelligence, care and prudence ought to have done," and then instructs the jury that "if the plaintiff was guilty of either of these kinds of negligence and thereby contributed proximately to produce the injuries" complained of, the jury ought to find a verdict for the defendant, is erroneous, in ignoring the consideration of willful, wanton or intentional negligence on the part of defendant's employés, and is properly refused.

17. *Charge as to contributory negligence.*—In an action against a railroad company to recover damages for personal injuries, it is proper to refuse a charge which instructs the jury that, "If the plaintiff by ordinary care could and would have avoided the injury of which he complains of, and if by his failure to exercise such ordinary care he contributed proximately to produce the injury of which he here complains, then, upon this state of facts, the jury ought to find a verdict for the defendant, although they may believe all the evidence as to any alleged negligence of the conductor, engineer or brakeman." Such charge ignores the consideration of any willful, wanton or intentional negligence by the defendant.

18. *Charge as to duty of plaintiff, in an action against a railroad.*—In an action against a railroad company, for the alleged negligent killing of plaintiff's child, the court properly refused a charge which instructed the jury that the law required the plaintiff to observe such prudent care in protecting his child and keeping it from going into dangerous places, as a reasonably prudent man would observe under like circumstances, and if the plaintiff did not observe such care, and

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"such omissions of care contributed in the slightest degree to the injury of the child, then, in such case, the verdict of the jury must be for the defendant, although the defendant may have been guilty of simple negligence." Such instruction ignores the consideration of willful, wanton or intentional negligence, and makes the slightest degree of negligence on the part of the plaintiff the equivalent of contributory negligence.

19. *Same*.—In such an action a charge is properly refused that instructs the jury that, if the evidence of the plaintiff raises a presumption that he was guilty of such acts of negligence in the care of his child as contributed in any degree to its injuries, "then, the burden of proof is upon the plaintiff to show he was not guilty of such negligence as contributed in the slightest degree to the injury of the child, and if the jury are reasonably satisfied the plaintiff has not done this, then the verdict must be for the defendant, although the jury may believe the defendant was guilty of simple negligence." Such charge not only ignores the consideration of any willful, wanton or intentional negligence, but erroneously defines contributory negligence.

APPEAL from the Circuit Court of DeKalb.

Tried before the Hon. JOHN B. TALLY.

This was an action brought by the appellee, W.M. Dobbs, against the Alabama Great Southern Railroad Company, to recover damages for the alleged negligent killing of the plaintiff's child by one of the defendant's trains.

As originally filed the complaint contained six counts. Two others were afterwards added by amendment. The first count attributed the death of the plaintiff's child to the wanton, reckless and intentional negligence of the defendant's employés. In the second count the plaintiff alleges that the accident occurred just below a public crossing, and that on approaching said crossing the engineer did not blow the whistle or ring the bell, as was required by statute. In the third count the negligence complained of was that the engineer did not use all the means within his power, known to skillful and careful engineers, to stop the train after the discovery of the child upon the track. In the fourth count plaintiff sought to recover on account of the negligence of the defendant in failing to provide proper brakes and appliances for stopping the train. In the fifth, after alleging that the accident occurred about one-fourth of a mile from Fort Payne, a station on defendant's road, the negligence alleged was that the engineer did not blow his whistle or ring the bell before leaving Fort Payne. In

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the sixth count the negligence alleged was that the engineer did not blow his whistle or ring the bell before entering or leaving Fort Payne.

The complaint was amended by adding the 7th and 8th counts. The 7th count, after alleging that the accident occurred near the south boundary of the town of Fort Payne, "at a point where the track of said railroad ran parallel to and within five or ten feet of the public highway," averred that the child was killed because "the engineer did not blow the whistle or ring the bell at short intervals on entering into or while nearing, within or passing through said town of Fort Payne." In the 8th count the plaintiff averred that said killing was the result of the negligence of the defendant's employes, in the management or running of said locomotive, train or cars. The defendant demurred to the 7th and 8th counts, on the grounds, first, that the cause of action complained of therein was a departure from the original cause; and, second, that said cause of action was barred by the statute of limitations of one year. This demurrer was overruled.

The defendant filed several pleas to the complaint. The first was the general issue to the complaint as a whole, and to each count separately. By the second plea the defendant set up that the accident did not occur at a public crossing; that at the time of the injury complained of the engineer in charge of the locomotive was a skillful and careful man; that said engine was of modern pattern and had all the improvements and appliances used on locomotives to secure safety in their operation and to avoid injury; that the cars constituting the train had all necessary and sufficient appliances, and had a sufficient number of careful and skillful brakemen to control said train; that up to the time and before the accident the engineer was keeping a proper and vigilant lookout, and doing all things required by law to avoid injury to any person or property; that the said child, by proper and vigilant lookout, could not have been seen until it came upon the track so suddenly and in such close proximity to the engine that the employment of all means known to skillful and careful engineers could not have avoided the injury. As a defense to the third count of the complaint, the defendant, in its 3d plea, alleged that the child came upon the track so suddenly and in such

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close proximity to the engine, that the use and employment of all means in the power of the engineer, known to careful, and skillful engineers, could not have avoided the injury; and that said locomotive and cars were supplied with all necessary appliances and machinery, and were sufficiently manned; and that the defendant's employes were, at the time, keeping a vigilant lookout for obstructions on the track, and could not have discovered the child before it came upon the track.

For answer to the fourth count, the defendant, in plea No. 4, alleged that at the time of the accident the locomotive and cars had all the appliances and machinery known to skillful engineers and operators of railroads to avoid injury to persons or property; that said locomotive and train were under the control and management of a skillful and careful engineer, and of careful and skillful brakemen, and sufficient in number; and that at the time of the accident the engineer was keeping a proper and vigilant lookout for obstructions upon the track, and that as soon as said child was discovered (and it was discovered as soon as legal diligence could have discovered it,) the engineer reversed the engine, applied the brakes, and the brakemen applied the brakes on the cars, and did all things in their power, known to skillful engineers and brakemen, to avoid the said injury. For answer to the fifth count the defendant, by plea No. 5, set up that the engineer in charge of the train blew the whistle and rang the bell at least one-fourth of a mile before reaching the public crossing mentioned in said complaint, and before reaching the station at Fort Payne, and continued to ring the bell at intervals until he passed said crossing. For further answer to the fifth count of the complaint the defendant, in plea No. 6, set up that the engineer in charge of the engine and train blew the whistle and rang the bell immediately before and at the time of leaving the depot at Fort Payne.

By plea No. 7 the defendant set up in answer to the sixth count of the complaint that the engineer in charge of the train blew the whistle and rang the bell at short intervals while moving within and passing through the town of Fort Payne.

The eighth plea of the defendant, which was interposed as an answer to the second, third, fourth, fifth and sixth counts of the complaint, averred, "That the plain-

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tiff ought not to have and maintain this suit, because, at and before the time of the occurrence of the injury mentioned in the complaint, the child alleged to be injured was in the care, custody and under the control of plaintiff as its father, and plaintiff was so negligent in and about the care of and control of said child at the time the alleged injury occurred that the said negligence contributed proximately to said alleged injury of said child, and without such negligence in the care and control of said child, said alleged injury to said child would not have occurred." To the seventh count of the complaint, which was added as an amendment, the defendant set up as an answer thereto the first, third, fourth, seventh and eighth pleas as above set forth. And in answer to the 8th count, the defendant set up the first, third, fourth and eighth pleas.

The plaintiff demurred to the second plea on the grounds, first, that the said plea does not negative the averments of the second count of the complaint, that the injury resulted from the failure of defendant's employé to blow the whistle and ring the bell as required by law; and, second, that said plea does not aver that the engineer did ring the bell or blow the whistle for one-fourth of a mile before and while passing the public crossing, as required by law. Plaintiff demurred to the third plea on the ground that said plea did not show that the defendant's engineer could not, by due care and proper lookout, have seen the child in time to have averted the accident. Plaintiff demurred to the third and fourth pleas to the seventh count of the complaint on the ground that they did not negative the averments of the seventh count, that the engineer did not blow the whistle and ring the bell at short intervals on entering into and passing through said town of Fort Payne, and that the injury resulted from said negligence. The plaintiff demurred to the third and fourth pleas to the eighth count on the grounds, first, that the said pleas, while negating certain grounds of negligence, did not negative all of the particular grounds in which, under the averments of said count, the defendant might have been shown to have been negligent; and, second, because said special pleas were unnecessarily prolix, and tended to mislead and confuse the issue, since the defendant might have had the benefit of the defense set up in such plea under the

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general issue. The plaintiff also demurred to the eighth plea and assigned the following grounds: First, that the said plea attempts to ascribe the negligence of the father to the child; second, that said plea fails to aver any contributory negligence on the part of the child; third, said plea does not set up such contributory negligence as will defeat the action; fourth, that said plea does not aver the facts out of which the alleged contributory negligence arises; fifth, said plea does not aver facts, but only legal conclusions; and, sixth, "that said plea does not aver that the said negligence on the part of defendant was wanton, intentional or reckless." The court sustained the demurrers to the third and fourth pleas, as applied to the seventh and eighth counts of the complaint, and overruled the demurrers to the other pleas.

The tendency of the evidence in behalf of the plaintiff and the defendant, as shown by the bill of exceptions, is sufficiently stated in the opinion.

Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave the following written charges: (1.) "The court charges the jury that, if the jury believe from the evidence that the absence of defendant's brakemen, or any of them, caused delay in stopping the train they may look to such fact, if it be a fact, in determining whether or not there was negligence on the part of defendant." (2.) "The court charges the jury that, if the jury believe from the evidence that the child, when first discovered, was 150 or 175 yards below the engine, they may look to the further evidence of skilled engineers to determine whether or not the train might have been stopped within that distance by servants of defendant in their places of duty." (3.) "If the jury believe from the evidence that the engineer did all in his power to avert the accident, but any one of the brakemen was negligent in the discharge of his duties, then the negligence of such brakeman is by law attributed to defendant; and if the jury further find that such negligence proximately caused the injury complained of, then the jury should find a verdict for plaintiff, unless they further find that the plaintiff has been guilty of contributory negligence." The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's

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refusal to give each of the following written charges requested by it: (1.) "The court charges the jury that, if they believe all the evidence in this case, they ought to find a verdict for the defendant." (2.) "The court charges the jury that there is no evidence in this case to authorize the jury to find that the defendant was guilty of wanton, reckless or intentional negligence." (3.) "Negligence consists either in doing what a man of ordinary intelligence, care and prudence ought not to do and would not do, or in omitting to do what a man of ordinary intelligence, care and prudence ought to have done and would have done. And if the plaintiff was guilty of either of these kinds of negligence and thereby contributed proximately to produce the injuries of which he complained in this suit, then the jury ought to find a verdict for the defendant." (4.) "If the plaintiff by ordinary care could and would have avoided the injury of which he complains of, and if by his failure to exercise such ordinary care he contributed proximately to produce the injury of which he here complains, then upon this state of facts the jury ought to find a verdict for the defendant, although they may believe all the evidence as to any alleged negligence of the conductor, engineer or brakeman." (5.) "In this case the law required that the plaintiff should keep and observe such prudent care in protecting his child and keeping him from going into dangerous places, as reasonably prudent men would observe towards their child under like circumstances and the situation surrounding them, and if the jury are reasonably satisfied from the evidence that the plaintiff did not observe such care towards his child, and such omission of care contributed in the slightest degree to the injuries of the child, then in such case the verdict of the jury must be for the defendant, although the defendant may have been guilty of some negligence." (6.) "If the jury believe from all the evidence in this case that the evidence of the plaintiff raises a presumption that he was guilty of such acts of neglect towards his care for the child as contributed in any degree to the injury of the child, then the burden of proof is upon the plaintiff to show he was not guilty of such negligence as contributed in the slightest degree to the injuries of the child, and if the jury are reasonably satisfied the plaintiff has not done this, then the jury must find a

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verdict for the defendant, although the jury may believe the defendant was guilty of some negligence."

On the cause being sent to this court on appeal, there was a *certiorari* issued to bring up a corrected copy of the bill of exceptions. Upon argument, the cause was submitted with a motion to strike from the transcript as originally certified to this court, what purported to be the admission of what the witness Hickman would swear, and also the charges purporting to have been given and refused by the court, on the grounds, first, that neither the admission nor charges were set out in the bill of exceptions which was signed by the presiding judge, as is shown by the corrected transcript, sent up in response to the *certiorari*; and, second, that neither said admissions nor charges are so identified in the bill of exceptions signed by the judge, as authorized the clerk to copy them into the bill of exceptions copied into the transcript. The facts pertaining to this motion are sufficiently stated in the opinion.

There was judgment for the plaintiff, assessing his damages at \$2,000. The defendant appeals, and assigns as error the several rulings of the court to which exceptions were reserved.

W. H. DENSON, and WATTS & SON, for appellant.

AMOS E. GOODHUE, *contra*.

HARALSON, J.—The bill of exceptions sent up as a return to the *certiorari* awarded by this court must be regarded as the true and correct record, since there is a difference between it and the transcript of the cause as originally filed.—*Pearce v. Clements*, 73 Ala. 256.

We settled the principle in the beginning, and have not departed from it since, that "when a document is sought to be made a part of a bill of exceptions by reference, and not by copy, it must be so described by its date, amount, parties, or other identifying features, that the transcribing officer can, unaided by memory, readily and with certainty determine, from the description itself, what document or paper is referred to, without room for mistake."—*Looney v. Bush, Minor*, 413; *Parsons v. Woodward*, 73 Ala. 348. In this bill of exceptions, we find two blanks left by the judge signing it. The first occurs

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after the words, "The defendant then offered the admissions of what the witness, Hickman, and others would swear, if present," where these words appear in parenthesis: "(These admissions are with the file of papers in the circuit clerk's office, and the clerk will set them out.)" The showing as to the witness, Hickman, alone, appears in the record, and we are to presume the showing as to other absent witnesses, if any, was not made, or, if made, not allowed. The clerk, in filling this blank under the direction of the judge, copied what purports to be a showing for a continuance of the cause, on account of the absence of the witness, Hickman, which showing contains the title of the cause, followed by a statement of the reasons why the witness was not present, and of what he would prove, if present. It does not appear there was any other witness in the cause by the name of Hickman, and nothing appearing to the contrary, the presumption is, there was but one of that name. The name of the witness is given, what he will swear is written out, the judge certifies that it was offered in evidence, that it is with the file of papers, and directs the clerk to set it out in the bill. Its identification seems to be so complete, as to leave no room for the clerk to mistake it for any other paper. He could, unaided by memory, determine, readily, what document was referred to by the judge, and he very properly inserted it as a part of the bill.

The second blank is at the point where the judge refers to the written charges of the plaintiff and the defendant in these words: "The court gave the following written charges to the jury, at the request of the plaintiff. To the giving of each of said charges, the defendant then and there made a separate *objection* to the giving of each of said charges, and the clerk will set out each of said charges." And, "The defendant requested the court to give the following written instructions to the jury. The court refused to give each of said instructions, and the defendant then and there made a separate exception to the refusal of the court to give each of said charges. The clerk will here set out said charges." The *certiorari* awarded in the cause by this court, on a suggestion of an incomplete record, required the clerk to certify a full and complete copy of the bill of exceptions as signed, and copies of the charges asked in the cause,

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separately from the bill of exceptions, with the endorsements thereon. He certifies he has done so, and that the words, "Given, Jno. B. Tally, J." and the words, "Refused, Jno. B. Tally, J." were in the handwriting of Judge Tally, and are the only charges in that court in this cause. Section 2756 of the Code makes it the duty of the presiding judge, to write "given" or "refused," as the case may be, on the charges moved for in the trial of a cause, and sign his name thereto, which thereby become a part of the record. When the judge instructed the clerk to insert in the bill charges which the statute makes a part of the record, there could have been no more uncertainty as to what was meant, than if reference had been made to any other part of the record in a case, if it had been offered in evidence, and the court had ordered it inserted. There were no other charges than the ones set out in the bill of exceptions, in the original and amended transcript, and there was no opportunity for mistake. There was no error in the clerk inserting them in the bill.—*Mobile Savings Bank v. Fry*, 69 Ala. 348; *Mobile & Birmingham R. R. Co. v. Ladd*, 92 Ala. 288, 9 So. Rep. 169.

The evidence is without contradiction, that the child that was killed was about eighteen months old; that it had wandered unattended out of its father's yard, and had gone down the railroad track, which was about 50 feet from the dwelling, and twenty-five feet from the yard fence, some hundred and fifty yards, and had clambered up on the track, just as the train was approaching; that its father, the plaintiff, had arrived at the house from town, about a half an hour before, and was at home when the train passed his door; that he knew the train was coming, as it was preparing to do so when he passed the depot, on his way home, and he knew the schedules of the trains on that road; that on arrival at home, he saw the child in the kitchen and playing about the yard, a few minutes before the train came along; that the train passed and stopped, and he was soon informed his child had been injured, and he supposed it had pushed open the gate to the yard fence, and gone out. Here, then, was a very young child, living within fifty feet of a railroad, along which trains were in the habit of passing several times a day, allowed to play by itself in the yard with the gate to the yard fence so inse-

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cure, as it could be opened by one of its age, with no one to attend or nurse it, and keep it from going where it pleased, and the father in the house, with knowledge of the schedules of the trains that passed his door daily, and that this train would pass along very soon. It is the assertion of a plain and obviously just principle to say, if parents permit a child of tender years to run at large without a protector in exposed and dangerous places, where it is liable to be damaged, they fail, in a legal sense, in the performance of their duties, and are guilty of such negligence as will preclude them from a recovery of damages for any injury resulting therefrom, which is not recklessly, wantonly or intentionally inflicted.—Beach on Con. Neg., § 142. Parents living in such close proximity to a railroad as this plaintiff did are under legal obligations to exercise care to protect their children from almost hourly peril, by having them attended or kept within secure enclosures. The evidence makes a plain case of contributory negligence on the part of the plaintiff for the injury sustained, such as disentitles him to compensation by the defendant corporation, unless it is overcome by more than simple negligence on the part of the defendant. Was the company guilty of such negligence?

The evidence of the witnesses for the defense tends to show, that the train was supplied with a sufficient force, and with the necessary and proper appliances for moving and controlling it; that a careful lookout for obstacles on the track ahead was observed by the engineer; that as soon as the child came into view, it was discovered, and all preventive appliances were at once put into operation to save it, but without avail; that it was not discovered in time to prevent the accident, and there is nothing tending remotely to show, so far as their evidence discloses, that the engineer and the force under him were unwilling or indifferent to do what they could to avoid the deplorable accident, after they discovered the exposure of the child. On the other hand, there is evidence introduced by plaintiff, competent for the jury to consider as tending to show, that he and his crew did not do all that might and ought to have been done to prevent the accident, after the peril of the child had been discovered—*Williams v. S. & N. Ala. R. R. Co.*, 91 Ala. 635, 9 So. Rep. 77; *Frazer v. S. & N. Ala. R. R. Co.*,

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81 Ala. 186, 1 So. Rep. 85; *Ga. Pac. R. Co. v. Lee*, 92 Ala. 262, 9 So. Rep. 230.

The witness, Nichols, who testified he had been an engineer on a railroad for twenty years, swore that he had examined the ground at the place of the accident, and knew the road, and, presuming the engine to be in good condition, with all the modern appliances in general use, and known to skillful engineers,—and such the evidence tends to show was the condition of this engine,—this train, by the use of such appliances, could have been stopped inside of one hundred and fifty yards. The engineer of the train testified, that the engine was about one hundred and fifty or one hundred and seventy-five yards from the child, when he first saw it, and that it was two hundred yards from the point where he first began to reverse his engine to the place where he stopped the train. The evidence of the witness, Nichols, leaves some ground of inference, on the part of the jury, which we are not permitted to withdraw from them, that the engineer failed to promptly use all available appliances to stop his train before reaching the child.

Pleas Nos. 2, 3 and 4, as amended, present, each, a complete defense. The demurrer to plea No. 2 was properly overruled. Pleas 3 and 4, as applied to the 7th count of the complaint, were no answers thereto, and the demurrers to them were properly sustained. Pleas 3 and 4, as applied to the 8th count, furnished answers thereto, and the demurrers to them should have been overruled. But this was error without injury, since the defendant had the benefit of the same facts under the general issue.—2 Brick. Dig., 352, § 348.

Charges given for the plaintiff, Nos. 1 and 2, are argumentative, and might have been refused on that account, but that they were given is not reversible error.—*Bancroft v. Otis*, 91 Ala. 279, 8 So. Rep. 286; *Warelbaum v. Bell*, 91 Ala. 331, 8 So. Rep. 571. Charge No. 3 given for plaintiff asserts a correct proposition. As there was some conflict in the evidence, charges Nos. 1 and 2, asked by defendant and refused, were properly refused. Charge No. 3 requested by defendant and refused, ignores the consideration of any willful, wanton or intentional negligence on the part of the defendant's employes, and was properly refused. If the evidence for the defendant, as to the alleged negligence of the engineer, conductor

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and brakeman is to be believed, the jury might have found for the defendant. Charge 4 on this subject, requested by defendant and refused, was faulty, for the same reason we have stated No. 3 was properly refused.

Charges Nos. 5 and 6, requested by defendant, ignore the consideration by the jury of any gross or wanton negligence by defendant's employes in charge of the train, and in making the slightest degree of negligence on the part of the plaintiff, the legal equivalent of that degree of negligence which contributed proximately to the injury.

We find no reversible error in the record, and the judgment of the circuit court must be affirmed.

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Statutory Action of Ejectment.

1. *Possession by grantor after execution of deed.*—Where the owner of land has executed and delivered a deed thereto, but has never parted with his actual possession, his possession is not that of owner, but of a tenant of the grantee; and his possession can not become adverse to his grantee without an open and distinct disavowal, and the assertion of a hostile title, brought to the actual knowledge of the said grantee.

2. *Conveyance of right of way; adverse possession of grantor.*—If, after the execution of a conveyance of a right of way to a railroad company, in consideration of the road being built on and along the grantor's land, and upon condition that if the road is not built upon such right of way the deed was to be null and void, the company located, levelled and graded the road along this line, the title passed to the grantee, and it became actually possessed of said right of way; and if, after the lapse of five years from the date of the conveyance, the grantor commenced to cultivate the land formerly conveyed, without the knowledge of the grantee, he did not thereby assert an adverse holding, nor was his cultivation such a re-entry as to originate a right to claim a possession adverse to his grantee.

3. *Condition of deed of conveyance; ejectment can not be maintained after its fulfilment.*—Where the consideration for a conveyance of the right of way to a railroad company was that the road should be built on and along the lands of the grantor, and the deed was conditioned

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that it should be void if the road was not built on said right of way, the grantor can not declare the conveyance forfeited and maintain ejectment for the land, after the road was built thereon, although not completed until after the lapse of 13 years from the date of the conveyance; neither the charter nor deed fixing any time within which the road was to be built.

APPEAL from the Circuit Court of Clay.

Tried before the Hon. LEROY F. BOX.

This was a statutory action of ejectment brought by Wm. A. Yancey against the Savannah & Western Railroad Co., and sought to recover certain property specifically described in the complaint. There was a plea of the general issue. The cause was tried before the court, without the intervention of a jury, on the following agreed statement of facts:

"On the 1st day of December, 1872, W. A. Yancey, the plaintiff in this case, executed to the Savannah & Memphis Railroad Company, an Alabama corporation, its successors and assigns, a deed to a certain tract of land in Clay county, Alabama. The deed was attested by two witnesses, and its execution is duly admitted. The lands sued for in this case are the lands described and embraced in the said deed. Shortly after the execution of the deed hereinbefore mentioned the Savannah & Memphis Railroad Company surveyed its line of road to Birmingham, Ala., and located its right of way, and levelled and graded the road-bed through the lands sued for, and embraced in the deed hereinbefore named. The terminus of said railroad at said time was at Goodwater, Ala., to which point it was then operated. The railroad was built and completed, in the spring of 1887, through the lands sued for, and completed in 1888 to Birmingham, Ala., to which point it is now operated. The charter of the Savannah & Memphis Railroad Company authorized it to construct its road to Birmingham, Ala. The Savannah & Western Railroad Company, the defendant in this case, is an Alabama corporation, and the successor of the Savannah & Memphis Railroad Company, the original grantee in the deed hereinbefore mentioned. That while said charter of said railroad company now owning said line of railway authorized its construction to Birmingham, Ala., yet the termini fixed by the charter of the company contracted with by plaintiff was

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from Opelika, Ala., on the south, to some point on the Tennessee river, near Tuscumbia, on the north or west. Said road was finally completed, and is now operated from Opelika, Ala., to Birmingham, Ala., but is not yet completed beyond the latter point. Its charter fixes no time in which it shall be completed. After the execution of the deed from the plaintiff above set out, with the exception of the survey of the route through the lands sued for and the grading of the line of way for said road, nothing was done or attempted to be done by the grantee in the way of completing the road through said lands for the period of thirteen years, though during all that time it was working on other parts of said road and operating it from Opelika to Goodwater. That after the lapse of to-wit, the term of five years from the execution of said deed, plaintiff having never actually parted with the possession of said lands, except as herein mentioned and shown, plaintiff commenced and continued, without the knowledge or consent of the defendant, the cultivation of a part of said lands, and without interruption did so until the lapse of thirteen years from the time of the execution of said deed, at which time defendant entered thereon without further permission of the plaintiff, and without his consent, and completed said road as now located. It is agreed that the rental value of said lands is four dollar per acre." The deed conveys the land sued for. The only provisions of this deed with which the decision has to deal, are copied in the opinion.

Upon the consideration of the cause on the facts as stated in the agreed statement of facts, the court rendered judgment for the defendant. Hence this appeal.

GORDON MACDONALD, for appellant.—After waiting five years for some substantial compliance by his grantor with the conditions of his deed, the plaintiff proceeded to cultivate and exercise acts of ownership over the lands conveyed, which amounted to a re-entry by him. The grantor in possession is not required to make formal entry for condition broken, in order to invest the estate in himself.—*Thompson v. Thompson*, 9 Ind. 323; *Taylor v. Cedar Rapids &c., R. R. Co.*, 25 Ia. 371; *Lincoln Bank v. Drummond*, 5 Mass. 321; *Hubbard v. Hubbard*, 97 Mass. 188; *Hamilton v. Elliott*, 5 Serg. & Rawle, 375; *Adam v. Ore Knob Copper Co.*, 4 Hughes (U. S. C. C.) 589.

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The completion of the road after the lapse of such an unreasonable time was not sufficient to invest the defendant with title.—*Stuyvesant v. Mayor*, 11 Paige 425; *Hamilton v. Elliott*, 5 Serg. & Rawle, 375; *Lincoln v. Drummond*, 5 Mass. 34; 2 Wash. Real Prop., (4th Ed.) 11; *Dickey v. McCullough*, 2 Watts, 88; *Hayden v. Slough-ton*, 5 Pick. 528; *Allen v. Howe*, 105 Mass. 241; *Adams v. Ore Knob Copper Co.*, 4 Hughes (U. S. C. C.) 589.

GEORGE P. HARRISON, *contra*.—The mere continued possession by the vendor of the lands is not adverse to his vendee; but he is considered as the tenant of the grantee.—1 Amer. & Eng. Encyc. of Law, 247, n. 4; *Burhans v. Van Zandt*, 7 Barb. (N. Y.) 91; *Col-lins v. Johnson*, 57 Ala. 304. There was no time fixed in the deed or in the charter of the company, within which the road was to be built. The road being actually completed before action was brought, the plaintiff could not recover.—*Buckner v. Railway Co.*, (Ark.) 13 S. W. Rep. 332; 3 Amer. & Eng. Encyc. of Law, 931; *Piedmont L. & I. Co. v. Piedmont F. & M. Co.*, 96 Ala. 389, 11 So. Rep. 332.

STONE, C. J.—This case was submitted on an agreed statement of facts, to be set out in the report of the case. The suit was commenced on January 18, 1890. The deed from plaintiff to defendant, under which defendant claims title, was executed December 10, 1872. By this deed the grantor granted to the Savannah & Memphis Railroad Company, of which the defendant is the successor, the right of way, one hundred feet wide, over certain described lands upon the recited consideration “running their contemplated railroad on and along his lands, as well as in consideration of the sum of one dollar to him in hand paid.” Immediately following the habendum clause of this deed is the following language: “Upon condition and it is expressly understood that should the said railroad, contemplated as aforesaid, be not located and established on and along said stretch, tract or parcel of land, described in the above and foregoing indenture, then said indenture is to be wholly null and void, and of no effect.”

“Shortly after the execution of the deed hereinbefore mentioned the Savannah & Memphis Railroad Company

surveyed its line of road to Birmingham, Ala., and located its right of way and levelled and graded the road-bed through the lands sued for and embraced in the deed." The easement, with right to possess and occupy, thereby passed to the grantee; and it was thus in actual possession of the tract of land conveyed. It must be regarded as holding adversely to all the world, including its vendor. The re-entry recited in the agreed statement of facts, by which the plaintiff sought to establish the inception of his adverse holding, is not sufficient to originate a right by adverse possession. "By the execution and delivery of a deed of land the entire legal interest in the premises becomes vested in the grantee, and if the grantor continues in possession afterwards, his possession is not that of owner, but of a tenant of the grantee. He will be regarded as holding the premises in subserviency to his grantee, and nothing short of an explicit disclaimer of such a relation and a notorious assertion of right in himself, will be sufficient to change the character of his possession, and render it adverse to the grantee."—*Burhans v. Van Zandt*, 7 Barb. (N. Y.) 91; *Butler v. Phelps*, 17 Wend. (N. Y.) 642.

But if it were otherwise, and his re-entry was sufficient to originate an adverse holding, his possession was not of sufficient duration to revest the legal title in him. It was but little more than eight years. Ten years, under our jurisprudence, are necessary to mature a right by adverse possession.

Again. The plaintiff is in no position to maintain the present action. The only condition on which the conveyance was to become null and void had been met and fulfilled nearly three years before he brought his suit. The railroad had been located and established on and along said stretch, tract or parcel of land when he instituted his suit. The main consideration for the conveyance was the building and maintaining of a railroad through his property. This had been done, and plaintiff had had the advantage and benefit of this consideration for quite a long time when he complained.

We discover no error in the finding of the circuit court, and the judgment is affirmed.

[Medlin v. Taylor, Judge, &c.]

Medlin v. Taylor, Judge, &c.*Application for Mandamus.*

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1. *Adjudication by a judge of his own incompetency not conclusive.*—The adjudication by a judge of his own incompetency to hear and determine a cause, and the entry of this conclusion on the record of his court, is not determinative or conclusive of the inquiry of incompetency *vel non*, on application for *mandamus*, or on appeal.

2. *Incompetency of a judge; how determined on application for mandamus, and on appeal.*—When application is made to the circuit judge for a writ of *mandamus*, to compel the judge of probate to hear and determine a certain cause, which he has adjudged himself incompetent to try, it is the duty of the circuit judge to determine the question of incompetency upon the facts disclosed, regardless of any adjudication made thereon by the judge, whose incompetency is at issue; and a like duty devolves upon this court on appeal from the *mandamus* proceedings.

3. *When probate judge incompetent to hear an election contest.*—Where a contest of the election of a tax collector is instituted before a probate judge, who was declared elected at the same time as was the contestee, and whose election was being contested before the judge of the circuit court upon the same grounds specified in the statement of contest filed by the contestant, such probate judge, although not disqualified under constitutional and statutory provisions, has, under the doctrine of the common law, such personal interest in the questions involved as to render him incompetent to hear and determine the contest, and to justify him in declining to do so.

APPEAL from the Circuit Court of Madison.

Heard before the Hon. H. C. SPEAKE.

The appeal in this case is prosecuted from a judgment refusing to grant a writ of *mandamus*, directed to Thomas J. Taylor, judge of probate of Madison county, and dismissing the petition for such writ, which was filed by the appellant, R. H. Medlin. The facts of the case are sufficiently stated in the opinion.

J. B. MOORE and ROULHAC & NATHAN, for appellant, cited *Ex parte State Bar Association*, 92 Ala. 113, 8 So. Rep. 768; *Keyser's Case*, 58 Cal. 315; *People v. Edmonds*, 15 Barb. (N. Y.) 529.; *McFadden v. Preston*, 54 Texas 403; *Taylor v. Williams*, 26 Texas 583; 27 U. S. Dig. 158, § 45; 1 Greenleaf Ev., § 389.

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R. C. BRICKELL, and MILTON HUMES, *contra*.—Although Taylor, the judge of probate, was not incompetent under the provisions of section 647 of the Code, he was disqualified under the doctrine of the common law, and these provisions justify his refusing to hear and determine the cause.—*Gill v. State*, 61 Ala. 169; *Morse v. Morse*, 11 Barb. 510; *McMillan v. Andrews*, 10 Ohio St. 112; *Dabney v. Mitchell*, 66 Ala. 495; *Washington Ins. Co. v. Price*, Hopkins Ch. 1; 1 Greenl. Ev., § 364; 1 Whart. Ev., § 600; *Moses v. Julian*, 45 N. H. 52; s. c. 84 Amer. Dec. 114. The statutory prohibition was not intended to, and does not, supersede or do away with the common law disqualifications.—*Ryan v. Couch*, 66 Ala. 244; *Scaife v. Storall*, 67 Ala. 237; *Beale v. Posey*, 72 Ala. 323; *Cook v. Meyer*, 73 Ala. 580; *Lanier v. Youngblood*, Ib. 587.

McCLELLAN, J.—Thos. J. Taylor, the probate judge of Madison county, declined to take jurisdiction of a contest instituted before him of an election to the office of tax collector of that county, and refused to hear and determine the same. Thereupon the contestant applied to the judge of the circuit court of that county for a writ of *mandamus* commanding the said judge to hear and determine said contestation. The petition for *mandamus* disclosed the grounds of Judge Taylor's recusation to be that he, said Taylor, and the contestee, one Esslinger, were candidates at the general election in August, 1892, the former for the office of probate judge and the latter for the office of tax collector, that they were each returned as elected to these respective offices, and his, Taylor's, election was at the time he refused to hear said contest between Medlin and Esslinger "being contested before the judge of the circuit court upon grounds, causes and for reasons in all respects similar to the grounds, causes and reasons specified in the statement" of contest filed by said Medlin against said Esslinger. A rule *nisi* was entered, and upon the coming in of the respondent he demurred to the petition assigning several grounds, two of which assignments were sustained. These were, *first*, that it appeared by the petition that respondent was "for legal cause incompetent" to hear and determine the contest; and, *second*, that it is shown by the petition for *mandamus* that said respondent, judge &c., "in the exercise of the jurisdiction with which by

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law he was clothed, adjudged and entered of record in said court of probate a judgment declaring his incompetency" to proceed with the trial of the cause, "and certified the fact of such incompetency to the register in chancery of the county of Madison."

To consider the second assignment of demurrer first: It is manifest that the gist of it lies in the assumption that the finding of the judge of his own incompetency and the entry of his conclusion to this effect on the records of the probate court is determinative and conclusive of the inquiry of competency *vel non* whatever might be the real fact in that connection. That this is not the law, and that, of consequence, it was the duty of the circuit court, and our duty on this appeal, to determine the question of Judge Taylor's competency on the facts stated in the petition and appearing by the exhibits thereto, wholly regardless of any adjudication he may have made in the premises, is thoroughly established by the decisions of this court.—*Ellis v. Smith*, 42 Ala. 349; *Ex parte State Bar Association*, 92 Ala. 113, 8 So. Rep. 768.

So that whatever view Judge Taylor may have entertained of his competency, and however he may have expressed it—in the form of a judgment entry on the records of his court or otherwise—and whether or not he certified his conclusion of incompetency to the register in chancery, the sole question presented by this appeal has to do with the facts out of which incompetency is supposed to be evolved, and must be determined accordingly as we find or do not find those facts to involve a disqualifying interest on the part of Judge Taylor in the result of the contestation he was called on to try.

That Judge Taylor did not have a disqualifying *interest* in the result of the case, within the provisions of our constitution and statutes, is virtually confessed in the argument of counsel and can not be doubted. To come within these inhibitions the interest must be a *pecuniary* one to be affected by the judgment in the particular case, and not merely an interest, pecuniary or other, in the question involved but not in the result of the particular case, and which, though not precluded by the judgment therein, may be affected by the "general operation of law on the *status* fixed by the decision." Judge Taylor not only had no pecuniary interest in the result of this contestation, but he had no interest whatever that could

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be affected by any possible termination of the issues involved.—*Ex parte State Bar Association*, 92 Ala. 113, 8 So. Rep. 768; 12 Am. & Eng. Encyc. of Law, p. 48; *North Bloomfield Mining Co. v. Keyser*, 58 Cal. 315; *The People v. Edmonds*, 15 Barb. 529; *McFaddin v. Preston*, 54 Tex. 403.

It is the opinion of the court, however, that under the doctrines of the common law, aside from our constitutional and statutory provisions, he had such a personal interest in the questions involved in the contestation of Medlin, in the nature of things, such a bias in favor of one of the parties to the case, as disqualified him to hear and determine the same, and justified his action in declining so to do.—*Gill v. State*, 61 Ala. 169, and authorities there cited.

The judgment of the circuit court denying the application for *mandamus* must be affirmed.

Frieder et al. v. B. Goodman Manufacturing Co.

Attachment Suit.

1. *Comments or notes of clerk of trial court in transcript; when not considered on appeal.*—The clerk of the trial court, in making out a transcript to be used on appeal as the record of the orders of the court and the proceedings of the trial, should transcribe only the orders and judgment of the court as they are entered, and should never incorporate in such transcript any matter or any comments or notes of his own. Such matters, or comments, or notes, if included in the transcript, will not be considered on appeal.

2. *Appeal; when original papers sent up.*—The clerk of the trial court has no authority to take from the files of any suit in his office, an original paper and send it to the appellate court, except upon the order or ruling of the judge or chancellor, when in their opinion it is necessary.

3. *Exception to ruling of trial court; how preserved.*—The record of an exception to the ruling of a trial court can not be secured or preserved by the clerk of such court making immediately after the recital of the ruling an entry in which it is stated that the party against whom the ruling was made reserved an exception, and to which entry

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is signed the name of the attorney reserving the exception; it is the duty of the court to note the exception by either party litigant to his ruling, and this noting constitutes the evidence of the reservation of such exception.

4. *Rulings on motions; how shown to be reviewed on appeal.*—The rulings of a trial court on motions, which are not entered in the minutes, must be presented on appeal by bill of exceptions; and unless thus presented, such rulings will not be reviewed.

APPEAL from the Circuit Court of Tuscaloosa.

Tried before the Hon. S. H. SPROTT.

This was an attachment suit, brought originally by the B. Goodman Manufacturing Company against the Southern Suspender Company, to recover an amount due the plaintiff on a promissory note. William Frieder, the appellant, was afterwards made a party defendant, as being the sole owner of the stock of the defendant company.

The original complaint, affidavit for attachment, bond, and writ of attachment were against the Southern Suspender Manufacturing Company. Motion was afterwards made by the plaintiff to amend its complaint, affidavit, bond, and writ of attachment in said cause, by inserting the name of William Frieder, who was the sole owner and proprietor of the Southern Suspender Manufacturing Company; and in said motion the plaintiff averred that the Southern Suspender Manufacturing Company was formerly a body corporate, but that all of its stock and property had passed into the ownership of William Frieder, and that the said Frieder continued to make contracts and to do business in the name of the Southern Suspender Manufacturing Company. The plaintiff also moved the court to allow the sheriff to amend his return to the writ of attachment so as to show that the notice of the levy of said attachment was served upon William Frieder. These motions were granted. The transcript contains no bill of exceptions, nor are the complaint, affidavit, bond, and writ of attachment, as amended, set out in the transcript. The other material facts are sufficiently stated in the opinion of the court.

There was judgment for plaintiff, and the defendant Frieder appeals. The assignments of error are that the court erred in granting the motions of the plaintiff to allow the amendments of the complaint, affidavit, bond, writ of attachment, and sheriff's return, and that the

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court erred in rendering judgment against William Frieder.

WILLIAM COCHRAN FITTS, for appellants.

J. M. FOSTER, *contra*.

COLEMAN, J.—This cause was submitted to be considered, first, upon the motion of the appellee, for a writ of *certiorari* to the clerk of the circuit court commanding him to certify to this court a perfect record; and, if this motion is overruled, then the cause is to be considered upon its merits. Affidavits are submitted in support of the motion, and also a counter affidavit by the appellant. We here observe that a clerk, in making out a transcript to be used on appeal as the record of the orders of a court and the proceedings of a trial, should never incorporate any matter or any comments or notes of his own in the transcript. He performs his entire duty, when he transcribes the orders and judgments of the court as they are entered. There is no bill of exceptions in this case. We find an entry made by the clerk, to the effect “that the amendments made in pursuance to the rulings of the court are shown forth in this record by being underscored with red ink.” There is nothing in the record of the orders of the court which authorized the clerk to insert any such note, as a part of the transcript. It is further stated by the clerk that “the original affidavit, bond and writ of attachment, as changed by amendment, are here attached by the clerk for the inspection of the supreme court.” The clerk has no authority to take from the files of any suit an original paper, and send it to this court. It is only upon the order or rule of the judge or chancellor, and when in their opinion it is necessary, that such original paper is transmitted to this court. Proper orders are then made for its preservation. See Rule 20, page 803 of the Code.

Just after an entry of record granting a motion made by plaintiff to amend the attachment proceedings, the following entry appears: “At the time of the granting of this motion the defendant reserved an exception to the granting of the same.” To this the attorney’s name taking the exception is signed. It is the duty of the court to note the exceptions to his ruling, and this is the evi-

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dence that an exception has been reserved. The attorney's name of record entry has no office to perform in securing or preserving an exception to the ruling of the court allowing an amendment.

The appellant certainly had the right to have a copy of the original attachment papers made a part of the record, and upon his motion, with proper showing, this court would have ordered the clerk to send up a complete and perfect record, but his attitude is that of resisting the motion of the appellee for a *certiorari*. Under the view we take of the case, the objections to the record designated by the appellee do not injuriously affect his interest. The appearance in court of William Frieder by his authorized attorney is for all purposes as effective as service of summons. The voluntary contributions to the transcript record by the clerk, whether emphasized by red ink, or in the matter of directing the attention of this court to "original papers," will not be considered.

Questions upon orders of the court allowing amendments upon motion of the plaintiff have been argued in briefs of counsel, but these questions are not presented in such a way as to authorize this court to consider them. They should have been presented by bill of exceptions. There is nothing of record to show what was moved for, and what allowed. Motions entered upon the motion docket are no part of the record, unless entered on the minutes, or shown by bill of exceptions, neither of which was done as appears from the record before us. The judgment must be affirmed.

Evansville, Paducah & Tennessee River Packet Co. v. Slater.

Action against Common Carrier for loss of Goods.

1. *Bill of exceptions; presumption when all the evidence not set out.*—When the bill of exceptions does not purport to set out all the evidence, this court will, on appeal, presume that there was other evidence in the case sufficient to support the judgment of the trial court.

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[Evansville, Paducah & Tennessee River Packet Co. v. Slater.]

APPEAL from the District Court of Colbert.

Tried before the Hon. W. P. CHITWOOD.

This was an action brought by the appellee, Mary W. Slater, against the appellant corporation to recover the value of goods, which had been deposited in a warehouse at Sheffield, Alabama, for shipment on the defendant's line of boats.

The Evansville, Paducah & Tennessee River Packet Co. is, and has been for a number of years, a common carrier by water, operating a line of steamboats in the Ohio and Tennessee rivers, between Evansville, Indiana, and Florence, Alabama. Sheffield, Alabama, being situated opposite Florence, on the Tennessee river, is practically one of the terminal points of the aforesaid carrier.

R. D. Morrow was superintendent of the packet company from 1886 to 1889, and during this time appointed H. H. Brumbach as collecting agent or landing-keeper for the packet company at Sheffield, Ala., which position he held at the time of the trial. Brumbach's authority, as agent of the packet company, was limited to receiving freight from the boat, collecting the boat's charges on same, and soliciting patronage. During the continuance of the aforesaid agency, Brumbach was operating a drayage or transfer business in and about Sheffield, doing a commission business in salt and hay, and engaged in forwarding and shipping goods. In this business he made use of a warehouse situated on the bank of the river below the regular landing. This warehouse was in no wise connected with the business of the packet company, nor did the packet company have any interest in, or control over it, but the same was used by Brumbach for his individual purposes and business.

Under the foregoing facts, the appellee, on or about February 29, 1892, had her household goods hauled by Brumbach and deposited in said warehouse at Sheffield, Ala., for the purpose of having them transported by the packet company to Evansville, Indiana. On the morning of March 1, 1892, the said warehouse and contents, including the household goods of appellee, were destroyed by fire, the origin of which was unknown. Appellee seeks to hold the packet company liable for the value of her goods under its common carrier liability. The case was tried without a jury, and the court rendered judgment in favor of appellee. The opinion renders it unneces-

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sary to make a more detailed statement of the facts of this case and of the rulings of the trial court.

WILHOYTE & HARRIS, for appellant.

J. B. MOORE and ROULHAC & NATHAN, *contra*.

HARALSON, J.—We have carefully examined the evidence in this cause, as we find it set out in the bill of exceptions in the transcript. Without more, it is not sufficient to support the judgment of the court below. Unless Brumbach was an agent of the defendant at Sheffield, authorized to make a contract of affreightment for defendant with the plaintiff, to transport her goods to Evansville, and, having such authority, made such a contract, and the goods were accordingly delivered to the defendant for carriage, the plaintiff was not entitled to recover. The evidence, as we find it in the transcript, falls far short of establishing such an agency, such a contract and such a delivery. So far as appears, Brumbach was not an agent for any such purpose, he made no contract of any kind to bind the defendant, and the goods were never delivered to him as agent for defendant.

But, be this as it may, the bill of exceptions does not contain a statement that the evidence therein set out was the evidence on which the trial was had, or was all the evidence introduced on the trial, and we are committed, by the uniform rulings of this court, to presume in such case that there was other evidence in the cause sufficient to support the judgment of the court below, and the cause must be affirmed.—*Hood v. Pioneer M. & M. Co.*, 95 Ala. 461, 11 So. Rep. 10; *Hunt v. Johnson*, 96 Ala. 130, 11 So. Rep. 387; 3 Brick. Dig., 406, §43; *Ib.* 81, §47.

Affirmed.

Baker v. Graves et al.

Bill in Equity to foreclose Mortgage.

1. *Amendments to bill; not allowed when repugnant to the averments of*

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the original bill.—Where a bill in equity is filed by the assignee of a mortgage, seeking its foreclosure, an amendment by which new parties defendant are made, and the validity of the assignment to the complainant is assailed, and compensation from the assignors is sought to be recovered, by reason of alleged fraudulent misrepresentation, is variant from, and repugnant to, the purposes for which the original bill was filed, and it can not be allowed.

2. *Demurrers to the bill; rulings thereon.*—While a demurrer to a bill in equity must set forth the grounds of demurrer specifically, if the decree of the chancellor is general, not stating the particular causes of demurrer, it will be referred to such grounds as were well taken.

APPEAL from the Chancery Court of Lowndes.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was originally filed by the appellant, N. C. Baker against Willis Graves and R. E. Brinson; and sought to have foreclosed a mortgage given by Graves to Pritchett & Merriwether, which was transferred by them to complainant. The original bill set up that Brinson, the landlord, had waived certain rights pertaining to the landlord's lien in favor of the mortgagee. Afterwards the complainant amended his bill making Pritchett & Merriwether and one McGrath parties defendant, and alleging that they had imposed on and defrauded the complainant, and misrepresented the condition of their agreement with Brinson. The only prayer contained in the amended bill is copied in the opinion. The defendant demurred to the amended bill on several grounds among which were, that it made a new cause of action, and was a departure from the original bill; and wholly inconsistent with it.

On the submission of the cause upon these demurrers the chancellor rendered the following decree: "This cause is submitted for decree on the demurrer of the defendant; and on consideration it is ordered that said demurrer be sustained. The complainant may offer an amendment to the bill." Complainant brings this appeal and assigns as error the decree of the chancellor in sustaining the demurrer.

J. C. RICHARDSON, for appellant.

GIRARD COOK, *contra*.

STONE, C. J.—As the assignee of the mortgage, the
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appellant filed the original bill for a foreclosure of the mortgage and to compel the parties who had received, or who were in possession of, parts of the mortgage property, to account for the same.

The amended bill avers that at the time of the assignment of the mortgage, the assignors made to the appellant the representation that the landlord of the mortgagor had waived his lien for rent on the crops conveyed by the mortgage; and also introduces a senior mortgage, of which the appellant claims to be assignee, and avers that it is entitled to priority of payment. The only prayer for special relief in the amended bill is expressed in these words: "That the said Pritchett and Merriwether and McGrath be held and required to make good their representations hereinbefore stated, and that the transfer to this complainant of said mortgage be held fraudulent and void, and the said Pritchett and McGrath and Merriwether, be required to refund to the complainant the amount of money paid by him to them for said mortgage, together with the interest thereon, and the damages which he has sustained thereunder." There were demurrers to the amended bill, and a decree rendered by the chancellor sustaining them, from which this appeal is taken.

1. The grounds of demurrer necessary to be considered, are, that the amended bill makes an entirely new case, and is a radical departure from the matter and cause of action stated in the original bill. Liberal as is the statute of amendments, and liberal as has been the judicial construction it has uniformly received, the right it confers is not without limit. Under the guise of an amendment, there can not be an entirely new case made, or a radical departure from the cause of action stated in the original bill. The purpose of the original bill was clear and well defined, the foreclosure of the mortgage assigned to the appellant—and in aid of it, an account of parts of the mortgage property which had passed into the possession of persons taking with notice of the mortgage. From this purpose the amended bill proposes to depart, and to make a new case variant from and repugnant to that made by the original bill. The foreclosure of the mortgage is abandoned, the validity of the assignment to the appellant is assailed, and compensation from the assignors is sought to be recovered, because of represen-

tations which it is supposed convict the assignors of fraud. If the amended bill presented matter of equitable relief, it is apparent that it is repugnant to, and variant from, the matter of the original bill, introducing a wholly different cause of action and ground of relief.—3 Brick. Dig., 380, §§ 208, 209, 219.

2. A demurrer to a bill in equity “must set forth the ground of demurrer specially, and otherwise must not be heard.”—Code, § 3443. Some of the causes of demurrer assigned, it may be, are too general, and could not be heard. The second, third and fourth causes of demurrer assigned by the appellee Brinson specify with sufficient distinctness the objection to the amended bill we have considered. The decree of the chancellor is general, not stating the particular causes of demurrer which were sustained, and if necessary, we would refer it to such causes as were well, and not to such as may be illy, assigned.

The decree is affirmed.

Whisenant v. Gordon.*

Bill in Equity to compel Specific Performance of Contract, and to enjoin Execution of a Judgment.

1. *Re-delivery of deed does not reinvest title in grantor.*—Upon the execution and delivery of a deed conveying land to the grantee, the title becomes vested in such grantee, and the redelivery of the deed and its mutilation or destruction by the parties can not reinvest the estate in the grantor, or estop the grantee from claiming title under it.

2. *Specific performance; what necessary to justify decree.*—To justify a decree for the specific performance of a contract of sale or conveyance of land, the terms of the contract must be definitely alleged, and the evidence to establish it must be such as to produce a clear conviction of the existence and terms of the contract as alleged.

3. *Conveyance of land; must be in writing.*—Conveyances of land must be in writing, and their execution must be accomplished by formalities, the observance of which is calculated to remove all doubt or uncertainty as to the grantor's intention to divest himself of the title to the land conveyed.

* This case was first announced on January 27, 1892. The opinion in response to the application for rehearing was announced November 8, 1893.

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4. *Statute of frauds; waiver as a defense to a bill for specific performance.*—The statute of frauds, as a defense to a bill for the specific performance of a contract, is waived unless specially pleaded; and the contract being admitted or satisfactorily proved, it will be enforced although it may be obnoxious to the statute.

5. *Parol agreement for conveyance of land; when specifically enforced.*—A parol agreement for the re-conveyance of land will be specifically enforced, at the suit of the vendee of the original vendor, when the circumstances surrounding the transaction, the conduct of the parties, and the declarations of the grantee in the original conveyance show that it was the intention of the parties to rescind the former sale and re-vest the title in the grantor.

APPEAL from the Chancery Court of Marshall.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed on October 3, 1889, by the appellee, Bathsheba Gordon against George Whisenant; and prayed to have specifically enforced an alleged parol agreement, by the respondent for the re-conveyance of certain lands, and for an injunction restraining the execution of a judgment recovered in favor of the respondent against the complainant in an action of ejectment. The facts of the case are sufficiently stated in the opinion. On the final submission of the cause, on the pleadings and proof, the chancellor decreed that the complainant was entitled to the relief prayed for. The respondent appeals, and assigns this decree as error.

JOHN G. WINSTON, JR., and THOS. H. WATTS, for appellant.—The bill shows that the legal title to the land was in the respondent at the time the complainant purchased the land, and that she knew this fact. The mere re-delivery of the deed by the respondent to his mother, or even the cancellation of the deed, was not sufficient to re-invest the mother with the legal title to the land in controversy.—*Reavis v. Reavis*, 50 Ala. 60; *Carithers v. Lay*, 51 Ala. 390; *Smith v. Cockrell*, 66 Ala. 64; *Brady v. Huff*, 75 Ala. 80. The evidence does not show that there was any cancellation or destruction of the deed by the respondent. This must be shown before there could be even an equity in the original grantor, Mary Whisenant. The cancellation or destruction would not divest the legal title, but would confer an equity in the grantor when it was clearly the intention of the parties to thereby re-invest the grantor with title.—*Reavis v. Reavis*, 50 Ala.

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60. The parol contract of agreement expressed in the bill is not such a one as could be made in the manner shown, but it should have been in writing, which should also show that the rescission was by the mutual assent of the parties.—*Badders v. Davis*, 88 Ala. 369, 6 So. Rep. 834.

The respondent was not estopped from setting up his title obtained by deed from his mother, because he handed her back the said deed, and said that he would have nothing more to do with her or the land.—*Sullivan v. Conway*, 81 Ala. 153, 1 So. Rep. 647; *Jones v. Cowles*, 26 Ala. 515; *Ware v. Cowles*, 24 Ala. 449. The possession by the appellant of the lands through his tenant at the time of the purchase by appellee was notice of the claim or title of the appellant, and was notice that he still claimed the land notwithstanding the surrender of the deed to his mother.—*Brunson v. Brooks*, 68 Ala. 248; *Tutwiler v. Montgomery*, 73 Ala. 263.

R. C. BRICKELL, and BROWN, HOLLIDAY & STREET, *contra*. (1.) After a judgment has been rendered against a defendant in an ejectment suit, he can go into a court of equity to enjoin the enforcement of said judgment, when the grounds upon which he claims the right of cancellation of the deed of the plaintiff is of purely equitable cognizance, and would have constituted no defense to an action at law.—*Lehman v. Shook*, 69 Ala. 486; *Jones v. DeGraffenreid*, 60 Ala. 145; *Womack v. Powers*, 50 Ala. 5; *Howell v. Motes*, 54 Ala. 1; *Nelson v. Dunn*, 15 Ala. 502; *Greenlee v. Gains*, 13 Ala. 198; *Calloway v. McElroy*, 3 Ala. 406; 1 Brick. Dig., 666, §§ 376, 382; 3 Brick. Dig., 347, § 229; High on Injunctions, § 327. (2.) The defendant was estopped by his acts and silence, regardless of what his intention may have been.—*Forney v. Calhoun*, 36 Ala. 463; *Abram v. Seales*, 44 Ala. 297; *Allen v. Maury*, 66 Ala. 10; Tiedeman on Real Prop., § 741; 3 Washb. Real Prop., § 456. (3.) While the redelivery of the deed to Mrs. Whisenant and its cancellation, and her restoration to the possession did not reinvest in her the legal title, yet in equity this effect will be given to it.—*Carithers v. Lay*, 51 Ala. 390; *Reavis v. Reavis*, 50 Ala. 60; *Barrett v. Thorndike*, 1 Greenl. Rep. 78. (4.) Besides that of estoppel, there is another principle upon which the equity of this bill may be maintained. The surrender of the deed back to Mrs. Whisenant, its cancellation and her restoration to the possession, while it

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did not revest the legal title in Mrs. Whisenant, it constituted a binding agreement to reconvey, which the complainant and her assignee or vendee has the right to specifically enforce. The surrender by Mrs. Whisenant of her right to a support by defendant constituted a sufficient consideration, and having been placed in possession, this took the transaction out of the operation of the statute of frauds and rendered it binding.—Code, § 1732; *Scott v. Griggs*, 49 Ala. 185; *McLure v. Tennille*, 89 Ala. 572, 8 So. Rep. 60. (5.) Besides, the defense of the statute of frauds was not presented either by plea, answer or demurrer; and hence, if it was the intention of the parties to the cancellation to revest title in the complainant's vendor, based upon the consideration of the surrender by her of her right to a support, the court will enforce this intention though the statute of frauds if properly presented might have constituted a full defense.—*Lewis v. Teal*, 82 Ala. 288, 2 So. Rep. 903; *Hughes v. Hatchett*, 55 Ala. 539; *Heflin v. Miller*, 69 Ala. 334; *Clark v. Taylor*, 68 Ala. 453; *Bolling v. Munchus*, 65 Ala. 558; *Phillips v. Adams*, 70 Ala. 373; *Bailey v. Irwin*, 72 Ala. 505; *Shakespeare v. Alba*, 76 Ala. 351.

WALKER, J.—The parties to this suit claim the land in dispute under different conveyances from Mrs. Mary Whisenant. In October, 1877, she conveyed the land by deed to the appellant, who is her son. In October, 1881, she executed another conveyance of the same land to Mrs. Gordon, the appellee. It is not alleged or claimed that the appellant ever reconveyed the legal title to his mother. The claim is that by a parol agreement between them, made prior to the execution of the conveyance to Mrs. Gordon, the deed to the appellant was cancelled, and by him surrendered to his mother, who was restored to the possession of the property. Mrs. Gordon acquired possession of the land under the deed to her, and remained in possession for several years, and until after the death of Mrs. Whisenant. The appellant having recovered a judgment against the appellee in a statutory action of ejectment for the land, the bill in this case was filed by the appellee to restrain the execution of the judgment in favor of the appellant, and to compel him to convey the legal title to the appellee.

The legal title which was vested in the appellant by

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the execution and delivery of the conveyance to him has remained in him, as it could not be divested by the cancellation of that conveyance, and its redelivery to the grantor therein.—*Bailey's Adm'r. v. Campbell*, 82 Ala. 342, 2 South. Rep. 646; *Smith v. Cockrell*, 66 Ala. 64; *Kimball v. Greig*, 47 Ala. 230. The appellee insists that, though there has been no reconveyance of the legal title, yet there was a binding agreement for such reconveyance, under which Mrs. Whisenant was restored to possession of the land, and that this agreement should be specifically enforced in favor of the appellee as Mrs. Whisenant's vendee. The appellant denies that he consented to a cancellation of the conveyance to him, or that he agreed that the title to the land should be reinvested in his mother. There is no competent direct evidence of such consent or agreement. The most that can be said of the proof in support of the claim set up by the bill is that it establishes certain facts which point to the conclusion that the arrangement between Mrs. Whisenant and her son, which was evidenced by her deed to him, was not fully carried out, but was abandoned. The deed to the appellant recites as a consideration the payment by him of the sum of one dollar, and also the further consideration that he is to take care of the grantor, and furnish her house room, board, lodging, clothing, and medical attention when necessary during her lifetime. It appears from the evidence that Mrs. Whisenant removed from the land in dispute to the residence of the appellant about the time of the execution of her deed to him; that she lived with him between two and three years, when she left his residence, and thereafter lived elsewhere; that he redelivered the deed to her, and she had possession of it at the time of her execution of the conveyance to the appellee, when she delivered it to the latter; that after the appellant redelivered his deed to his mother, and she left his residence, he contributed but little towards her support; and that, with knowledge of the deed to the appellee, he permitted the latter to obtain and keep undisturbed possession of the land until after his mother's death. The facts here referred to indicate that Mrs. Whisenant did not continue to receive from the appellant the care and support stipulated for in her deed to him, and that when he ceased to furnish her a home, and after she made a deed of the same land to another

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person, he abandoned possession of the land until after her death. One witness, who appears from his own statement not to be on friendly terms with the appellant, testifies to conversations in which the appellant said that he had returned the deed to his mother; that he was tired of her; that she was troublesome, and he would not be bothered with her for two such places; that he gave her back the deed, as she was wanting the land back to sell it or to make a support out of it herself. Another witness testified: "I have heard him [the defendant] say that he was not going to cultivate the land; that he had given her up the deed, and that he was not going to have anything more to do with it; and said also that he thought he had to pay for all he did for her; that she was troublesome and aggravating, and that he would never have anything more to do with her * * The defendant told me he had given back to his mother the deed because she was so much trouble that he did not want to be bothered with her. He stated to me that he intended never to have anything more to do with her or the land, and also stated that he would not be bothered with her for two such places, and that she might live five or six years longer, and that it would be worth more than the land to care for her if she did live that long. He thought he had about got pay for all he had done for her." Doubt is cast upon this testimony by the appellant's explicit denial that he had any such conversation, and by the testimony of several other witnesses to the effect that when this witness was examined in an unlawful detainer case between the same parties he gave a materially different version of the statements made by appellant to him.

The evidence above referred to is what must be relied on to support the conclusion that when the appellant handed his deed back to his mother he abandoned his claim to the land, and that it was understood between them that she should be the owner of the land from that time. But there are several considerations in the way of accepting this conclusion with any confidence in its correctness. In the first place, even after rejecting a mass of incompetent evidence on both sides, we are still confronted with irreconcilable conflicts at every material point throughout the testimony. Furthermore, it appears that the appellant did not give up the land when

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he handed his deed back to his mother, but retained possession of it by his tenant for a considerable time thereafter. There is no competent evidence to show that he knew of or consented to the mutilation of his deed by tearing off the signature and acknowledgement. There is evidence tending to show that before the conveyance was made to the appellee a message was sent to her by the appellant, warning her that if she bought the land from his mother she would buy a lawsuit; and it is plain that the appellee was informed of the prior conveyance to the appellant, and yet refrained from making any inquiry of him as to his alleged relinquishment of his claim; and also that she paid less than one-third of the value of the land, which is a circumstance tending to show that there was doubt as to the ability of the seller to convey a good title, and that it was not clearly understood that the appellant had abandoned his claim. The result of the examination of the record is that we find that the appellee relies upon an alleged agreement by the appellant that his mother should again become the owner of the land; that there is an entire absence of direct evidence of the terms of the alleged agreement or of the consideration to support it, and that the conclusion that there was any such agreement at all can be reached only by relying upon doubtful inferences from circumstances not established by clear and satisfactory proof. It can not be said that it plainly appears from the evidence that the appellant's act in handing his deed back to his mother, and her act in removing from her son's residence, were done in the performance of a definite agreement between them that the son should cease to be the owner of the property which had been conveyed to him, and that the mother should be restored to the ownership. The utmost effect that can be given to the evidence as to the conduct of the mother and son is to concede that it suggests the probability that there was some such understanding between them. It was not incumbent on the appellee to show that in the making of the alleged agreement by the appellant to reinvest his mother with the title the requirements of the statute of frauds were conformed to. Any objection because of such non-conformity was waived by the failure to interpose a defense on that ground, either by demurrer or answer. *Shakespeare v. Alba*, 76 Ala. 351. But the failure to

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plead the statute of frauds did not relieve the appellee of the duty of furnishing the full measure of proof which is required to justify a decree for the specific enforcement of a contract for the sale or conveyance of land. The terms of the contract must be definitely alleged, and established as alleged by clear and satisfactory proof. If the evidence fails to prove the contract, or any of its terms are left in doubt or uncertainty, a specific performance will be refused. Courts will not, in such cases, grope their way on inconclusive probabilities, or grant relief on merely persuasive testimony. The evidence must be such as to produce a clear conviction of the existence and terms of the contract as alleged.—*Carlisle v. Carlisle*, 77 Ala. 339; *Derrick v. Monette*, 73 Ala. 75; *Pike v. Pettus*, 71 Ala. 98; *Daniel v. Collins*, 57 Ala. 625; *Aday v. Echols*, 18 Ala. 353; *Bogan v. Daughdrill*, 51 Ala. 312. Conveyances for the alienation of land are required to be in writing, and their execution must be accompanied by formalities, the observance of which is calculated to remove all uncertainty as to the grantor's intention to divest himself of the title. The provision of the statute on this subject would fail in its purpose to prevent the divestiture of title to land by any act of equivocal meaning, if the landowner could be charged with the duty to convey by evidence which leaves it in doubt or uncertainty whether or not he intended to bind himself by a contract to part with his title. The testimony in this case is so conflicting, and the claim that the appellant agreed that his mother should be reinvested with the title to the property in dispute is so dependent upon inferences from circumstances of doubtful import, that the evidence can not be regarded as so clearly establishing an agreement for a conveyance as to justify a decree for its specific enforcement.

The appellee does not occupy the position of a *bona fide* purchaser without notice of the prior conveyance to the appellant, for, though that conveyance had not been recorded, yet it is plain from the evidence that the appellee was informed of its existence when the deed of later date was made to her. There is no evidence to show that the appellee in making her purchase was influenced by any representation or admission made by the appellant, or that she acted on any assurance from him that he no longer claimed the property. There is

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nothing upon which the appellee can rest a claim that the appellant estopped himself from asserting against her the title vested in him by the prior conveyance, unless such estoppel resulted from his act in redelivering that conveyance to his grantor, who thereafter undertook to convey the same land to the appellee. It is plain, as has been already stated, that the redelivery of the deed, and its destruction by the parties, are ineffectual to revest the estate in the grantor. It was not decided in *Reavis v. Reavis*, 50 Ala. 60, or in *Carithers v. Lay*, 51 Ala. 390, that the mere cancellation of a deed could operate as a divestiture of the title of the grantor therein, or to preclude him from asserting his title. Those cases merely recognize the equitable title of the real purchaser of land who had paid the purchase money and taken possession with the full consent of the person who was the grantee in the conveyance which had been destroyed. It was not held in either of those cases that the consent of the grantee to the cancellation of his deed would estop him from claiming title under it. But it has been held by some courts that a grantee may estop himself from claiming title under his unrecorded deed by consenting to its cancellation, or by redelivering it to his grantor with the intention that the latter should reacquire the property.—*Farrar v. Farrar*, 4 N. H. 191; *Trull v. Skinner*, 17 Pick. 213; 1 Devl. Deeds, § 302. The text writer just cited says: "These decisions, however, are confined to but a few States, and it is obvious that they must, in a measure, conflict with the provisions of the statute of frauds. If the rule that the cancellation of a deed or its redelivery to the grantor would operate to revest the title were adopted, it would permit the perpetration of the frauds which it was the design of the statute to prevent. The deed might be redelivered to the grantor for many other purposes than a transfer of the title. As in the cases cited in the following section, the deed might be returned for the purpose of correction or acknowledgment. Resort would have to be had to parol evidence in case of controversy, to determine the intention with which the redelivery was made. These decisions have frequently been referred to in other States, but always with disapproval. And, as said by Mr. Justice Compton, in a case in Arkansas, (*Strawn v. Norris*, 21 Ark. 80, 82), 'It would not be easy to maintain

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the soundness of these decisions upon principle.''' 1 Devlin on Deeds, § 305. The contention in this case illustrates the unsatisfactory operation of such a rule of estoppel. Here only the bare fact of redelivery is clearly shown. That act was of equivocal import. It did not necessarily indicate that the grantor intended to give up the property. We now find the deed in a mutilated condition, but the evidence does not show that the grantor consented to the mutilation, or treated that act as a cancellation of the conveyance. We have only the testimony of the witnesses to look to for information as to the circumstances attending the redelivery and mutilation of the instrument, and as to the acts and expressions of the parties indicating the presence or absence of an intention that the grantor should be restored to the ownership of the property. The mere act of redelivering the deed was without effect upon the title. The accompanying agreement of the parties, and not the mere act of redelivery, is the feature of the transaction which must be relied upon as the basis of an estoppel. That agreement rests wholly in parol. As an agreement it is without effect upon the title to the land. The effort is to give it the same effect, by way of an estoppel upon the grantee to assert his legal title, as it would have had if it had been reduced to writing, and signed by the parties. If such a rule of estoppel is recognized, the result is that a change in the beneficial ownership of land may be effected by a mere parol agreement, proved only by the testimony of witnesses. We can not recognize a rule of estoppel which would offer such temptations for fraudulent evasions of the requirements of the law upon the subject of conveyances for the alienation of land. We may add, in this connection, that the impression made upon us by the testimony of the appellee is that she acted on the erroneous supposition that the effect of the prior unrecorded conveyance was destroyed by the mere acts of redelivery and mutilation, rather than that she was misled, in making the purchase of the land, by any declaration or conduct of the appellant indicating his disavowal of all claim to the property. She was simply mistaken as to the law when she supposed that the appellant was bound by a transaction which in reality had no legal effect. Certainly it does not satisfactorily appear that she was induced to make the pur-

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chase by anything said or done by the appellant, and for this additional reason she is not in a position to claim that he has estopped himself from asserting his legal title.—*Morris v. Alston*, 92 Ala. 502, 9 South Rep. 315; *Leinkauff v. Munter*, 76 Ala. 194.

It is unnecessary to review the ruling made on the demurrer to the bill. Any want of proper allegations in the bill might be cured by amendment. Conceding the sufficiency of the bill, yet the evidence adduced does not warrant the granting of the relief prayed upon either of the grounds, that the defendant had made a valid agreement to reconvey the land in dispute to the complainant's grantor, or that the defendant is estopped from asserting against the complainant the legal title vested in him by the prior conveyance. For the reason that the complainant's claim is not supported by sufficient evidence, the decree of the chancery court is reversed, and a decree will be here rendered dismissing the bill.

ON REHEARING.

MCCLELLAN, J.—Upon a further examination of the evidence in this cause we have reached the conclusion that it was the intention of George E. Whisenant and his mother, Mary Whisenant, and their contract, cognizable in equity, though inoperative at law, to rescind the sale by the latter to the former of the land in controversy, and to revest the title in Mary Whisenant. We are now of the opinion that this purpose and parol contract are clearly shown by the redelivery of the deed to Mrs. Whisenant; her contemporaneous abandonment of the house of her son George, where, by the terms of the deed, he was to support her for life in consideration of her conveyance of the land to him; his ceasing from that time to yield this continuing consideration; his failure, certainly after the current year, during her life, and for more than a year after her death,—in all six or seven years,—to assert any claim to the land; the constant assertion during this time of ownership by Mrs. Whisenant and her vendee, the complainant; and his repeated declarations, which we think the evidence satisfactorily establishes, that he was tired of his mother, that “she was bothersome,” that he “would not be bothered with her for two such places,” that he “had

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about been paid for what he had done for her, and that, as she wanted the land to make a support out of or to sell, he had returned the deed to her, and had or did not intend to have anything more to do with the land," etc. It is true that there is no direct, positive evidence of an express agreement of a rescission or to rescind, and that one party swears there was no such agreement, while the mouth of the other is sealed in death, but the circumstances surrounding the transaction, the conduct of the parties, and the declarations of the defendant point with great emphasis to the conclusion that there was such an agreement, and that its terms involved an equitable reconveyance of the land to Mrs. Whisenant; and the facts adduced are inexplicable upon any other hypothesis. That such an agreement may be thus shown by circumstances with requisite certainty can not be questioned. Wat. Spec. Perf., § 493; Fry, Spec. Perf., § 1003. And that when the agreement is sufficiently shown,—as we now find in this case,—though relating to realty and resting in parol, equity will specifically enforce it is demonstrated in the opinion in chief. The members of this court when the case was originally decided were doubtful of the conclusion then reached on the facts, and none more so than the learned justice who delivered the opinion. We now reach a different conclusion, set aside the judgment of reversal heretofore entered, and affirm the decree of the chancery court.

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Action on Promissory Notes.

1. *Error without injury; rulings on pleadings.*—The sustaining of a demurrer to a special plea, even if erroneous, is not ground for reversal, when the record shows that the defendant had the full benefit of the same defenses under other pleas.

2. *Foreign corporations; executed contract.*—Where a contract has been executed, there can be no relief granted because the transaction originated with a foreign corporation, which had not complied with the statutory requirements, prescribing the conditions on which it might transact business in this State.

3. *Notes given for life insurance premiums; invalid defense.*—In an action on notes, given by the defendant to the plaintiff, who was the agent of a foreign insurance company, for money he had advanced for the defendant, for the payment of his premiums to said insurance company, it is no defense that said company had not complied with the statutory provisions, relative to the doing of business in this State by foreign corporations.

APPEAL from the City Court of Birmingham.

Tried before the HON W. W. WILKERSON.

This was an action brought by the appellee against the appellant, and counted upon two promissory notes given by the defendant to the plaintiff. The case was tried by the court without the intervention of a jury, and judgment was rendered for the plaintiff.

The defendant appeals, and assigns as error the several rulings of the trial court.

MCGUIRE & COLLIER, for appellant.—The plaintiff can not maintain the present action, because the insurance company which issued the policies to the defendant had not complied with the statutory requirements, providing for the doing of business in this State by foreign corporations.—Code, § § 1209 et seq.; *Farrior v. New Eng. Mortg. Sec. Co.*, 88 Ala. 275, 7 So. Rep. 200.

No counsel marked as appearing for the appellee.

HARALSON, J.—Errors are assigned for the alleged reason, that the court sustained demurrers to special pleas 7-10; but the 10th is the only one appearing to have been demurred to, and the court seems to have made no ruling on that one. Errors are also assigned for the sustaining of demurrers to other pleas, but we decline to pass on these rulings, for the reason, that there is uncertainty in the record as to what was done, and besides, it can be of no injury to the defendant, since the case was tried on the general issue, and on the issue intended to be presented by his special pleas. It would seem that issue was taken on pleas from 7 to 10, inclusive, which presented the same defense, more fully than the other special pleas did, and whatever may have been the rulings of the court of these others, the defendant has no ground of complaint.—*Pelican Ins. Co. v. Smith*, 92 Ala. 428, 9 So. Rep. 327.

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The notes sued on were given by the defendant below, Russell, to the plaintiff, Jones, and grew out of a transaction of the insurance of the life of defendant by the Mutual Life Insurance Company of Kentucky, a foreign corporation, of which the plaintiff was, at the time, an agent. The defense relied on was, that said insurance company, before beginning business in this State, and previous to the execution of the notes sued on, had failed to comply with the requirements of section 1209 of the Code, prescribing conditions on which foreign corporations may transact business in this State.

The proof shows that the company was a Kentucky corporation; that defendant took out a policy of insurance on his life in the company, paid part of the premium in cash and gave his notes for the balance. If this were all, and the contract were executory, and it were shown the company had failed to comply with the requirements of the section of the Code above referred to, there could be no question, but that, under our adjudications, there could be no recovery on the notes. The plaintiff, however, testified to a state of facts which, if true, takes these notes out from the influence of those decisions and places them under the influence of others, which hold that, where the contract has been executed, there can be no relief granted, because the transaction originated with a foreign company, which had not complied with our laws.—*Long v. Ga. Pac. R. R. Co.*, 91 Ala. 519, 8 So. Rep. 706; *Craddock v. Am. Freehold Land Mortg. Co. of London*, 88 Ala. 282, 7 So. Rep. 196.

The defendant testified, that these notes were given in extension of his notes previously given for premiums due by him to said company, and that he did not know he was dealing with the plaintiff except as agent of the company. The plaintiff testified, in substance, that he had no interest whatever in the life insurance policy referred to, or in any premiums thereon; that the company had sent out the renewal receipts to be delivered to the defendant on payment by him of his premium notes; that defendant stated he was pressed for money and could not pay the amount due on his insurance policy; that plaintiff proffered to advance the money for defendant, to enable him to pay his premiums, and take his notes, if he was sure he could pay when the notes fell due, which defendant said he could do; that plaintiff

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made inquiry and was satisfied with defendant's financial standing, and, accordingly, he advanced the money to the company for defendant and took his notes, surrendered to him his renewal receipts, and forwarded to the company the amount due from defendant; that the notes taken were not for the benefit of the company, and it had no knowledge of or interest in them, but that the transaction was entirely and exclusively a personal one between the plaintiff and the defendant; that plaintiff discounted said notes at bank, and when they matured defendant claimed to be unable to pay them, and asked an extension of time, whereupon plaintiff, as endorser, paid the bank, the notes were re-transferred to him, and further indulgence was allowed to defendant; that the sole consideration of the notes was the money so advanced by plaintiff individually to defendant, and he had no control over or interest in defendant's policy of insurance.

The defendant denied that this conversation occurred, as to plaintiff's advancing the money for him; but he admitted that in the conversation, about which plaintiff had testified, he agreed to extend the time on the premium, and the notes were accordingly extended. The notes show on their face, that they were payable to the plaintiff individually, and not to the insurance company. The defendant introduced evidence tending to show that the insurance company had not complied with the requirements of the statute.

The trial was had by and before the presiding judge, a jury having been waived as provided by statute in such cases, and a judgment rendered in favor of the plaintiff against the defendant. We fail to see that the trial court committed any error in the judgment it rendered, and it is accordingly affirmed.

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Action of Trespass for Cutting Timber.

1. *Bill of exceptions; presumption when all the evidence not set out.*—When the bill of exceptions does not purport to set out all the evidence. Vol. 101.

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dence, this court will, on appeal, presume there was evidence introduced on the trial of the cause which justified the action of the lower court.

2. *Charge to the jury; undue prominence to a part of the evidence.*—A charge to the jury which emphasizes and gives undue prominence to any single fact or part of the evidence, is calculated to mislead the jury and should be refused.

3. *Abstract charges.*—Charges that are abstract should be refused, although they contain correct propositions of law

APPEAL from the Circuit Court of Autauga.

Tried before the Hon. JAMES R. DOWDELL.

This was an action of trespass, brought by the appellee, James R. Williams, against the appellant, W. W. Wadsworth, to recover damages for cutting and carrying away timber and wood from the lands, which were alleged to be the property of the plaintiff; and was commenced on March 7, 1891.

The bill of exceptions in this case was as follows: "The plaintiff introduced for the purpose of showing possession of certain land, the following deeds, one from Marity Mire to H. W. Clark & Co.—a timber deed—executed on the 26th day of May, 1883, and filed in the probate office of Autauga county for record April 22d, 1891, and recorded July the 10th, 1891. And one deed from Marity Mire to Albert Mire, executed the 27th day of November, 1888, which deed was filed for record in the probate office of Autauga county, February 2, 1891, and recorded July 14, 1891. During the progress of the trial, the defendant introduced evidence tending to show that he came into the possession of the lands in controversy in this case under a deed executed to him by W. C. Howell and wife, Kate T. Howell, May 29th, 1879. Thereupon the defendant asked the court to give the following charges which were in writing: (1.) The jury, in investigating the question of possession of the lands, the subject of contention in this suit, may look to the fact, if it be a fact, that some of the deeds introduced by the plaintiff were not recorded in the probate court of Autauga county until the commencement of this suit in this court. (2.) That the jury, in investigating the facts of this case and weighing the testimony, may look to the fact, if it be a fact, that the Mire's deed and the timber right deed to Clark & Co., introduced by the plaintiff, were not recorded in the probate court until the

commencement of this suit; and if the jury believe from the evidence that the defendant entered into the possession of the lands in controversy, in good faith and under color of title, and held the same without notice of the plaintiff's title, then he would not be liable for the alleged trespass, and a verdict can not be rendered in favor of the plaintiff. The court refused each of the charges above mentioned, and to the refusal of each of said charges the defendant excepted."

There was judgment for the plaintiff. The defendant appeals, and assigns as error the refusal of the court to give the charges requested by him.

J. M. FALKNER, for appellant.

No counsel marked for appellee.

COLEMAN, J.—This was an action to recover damages for trespass upon lands. The assignments of error are based upon the refusal of the court to give two several charges requested in writing by the defendant. No briefs have been filed by either party.

The bill of exceptions is very meagre, and does not purport to set out all the evidence. When this is the case this court will presume there was evidence introduced on the trial which justified the action of the court. *Evansville, Paducah & Tennessee River Packet Company v. Slater*, ante, p. 245, and authorities collected.

The first charge requested directed the attention of the jury to a single fact. There may have been other facts in evidence, controlling or qualifying the fact thus singled out. Moreover, it is not error to refuse a charge which emphasizes and gives undue prominence to any single fact. Such charges are calculated to mislead the jury, and generally are regarded as argumentative, and for this reason may be properly refused.—*Bell v. Kendall & Co.*, 93 Ala. 489; *A. G. S. R. R. Co. v. Sellers*, *Ib.* 9; *Jackson v. Robinson*, *Ib.* 157; *Eastis v. Montgomery*, *Ib.* 293.

From all that appears in the record the second charge refused was abstract.—*Bostic v. The State*, 94 Ala. 45; *Smith v. Collins*, *Ib.* 394.

There is no error in the record.

Affirmed.

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Kellar v. Bullington.

Bill in Equity to enjoin the Commission of Trespass.

1. *Injunction; when granted to enjoin trespass.*—A court of equity will not grant an injunction to prevent the commission of trespasses, unless the complainant shows a satisfactory title to the *locus in quo*; and if the title be denied or in doubt, the injunction will be refused against the defendant who is in possession, until the title is established at law.

2. *Same.*—An injunction will not lie in favor of a complainant not in possession of the actual property trespassed upon, to restrain the removal of stone from lands of which the defendants had possession under a claim of ownership, when the complainant obtained title thereto from the Government by his entry as a homestead, until the disputed question of title has been adjudicated.

APPEAL from the Chancery Court of Colbert.

Heard before the Hon. THOMAS COBBS.

The facts of the case are sufficiently stated in the opinion.

L. B. COOPER, and ROULHAC & NATHAN, for appellant. The commission of the trespass *vel non* by the respondents in this case depended upon the validity of their claim of title to the property upon which the trespass was alleged to have been committed. A court of chancery had no jurisdiction to determine the issue, and the parties should have been remitted to a court of law for its determination. The case made by the averments of the bill was not such a one as would justify the granting of the injunction prayed for.—*Hambrick v. Russell*, 86 Ala. 199, 5 So. Rep. 289; *Hooper v. S. & M. R. R. Co.*, 69 Ala. 537; *Armstrong v. Gilchrist*, 2 Johns. Cas. 424, 430-1; *People v. Chicago*, 52 Ill. 424, 428; 1 Pomeroy Eq. Jur., § 176; 1 High on Inj., (3d. Ed.), § 650; *Bell v. Chadwick*, 71 N. C. 329; *Sullivan v. Rabb*, 96 Ala. 442, 5 So. Rep. 746; *Jerome v. Ross*, 7 Johns. Ch. 315.

J. B. MOORE, *contra*, cited 9 Ala. 289; 21 Ala. 288; *Oaksmith v. Johnson*, 92 U. S. 343; *Farley v. Smith*, 39

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104	138
101	267
127	84
127	480
101	267
135	124
101	267
137	657

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Ala. 38; *Swann & Billups v. Lindsey*, 70 Ala. 507; *Iverson & Robinson v. DuBose*, 27 Ala. 418; 12 Wall. 92 and 103-4; *Blevins v. Cole*, 1 Ala. 212; *Street v. Nelson*, 80 Ala. 231; 95 Ill. 391; 1 Amer. & Eng. Encyc. of Law, 298.

HEAD, J.—On March 17th, 1884, Arthur H. Kellar purchased at the judicial sale of the lands of the estate of F. C. Vinson, deceased, made by R. B. Lindsey, the administrator, several hundred acres of land, in Colbert county, Ala., and after report and confirmation, and payment of the purchase money, received, on the 26th day of September, 1887, the deed of the administrator thereto. This sale and deed included the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 23, township 5, range 11. The intestate, Vinson, had no title to this forty acres, but the same were public lands, the title of the government having never been divested. It is not shown when the report of this sale was made to the probate court by the administrator, and there is no evidence to show that Kellar acquired any color of title, until the execution of the administrator's deed on the 26th day of September, 1887, which was several months after the filing of the bill in this case; but it is a fact, established by the pleadings and proofs without controversy, that from the time of his purchase in 1884, until the complainant's, Bullington's, entry hereinafter referred to, and for a while thereafter, he was ignorant of his want of title, believed he had a good title, and claimed the said forty acres as his own, under said purchase, and that his possession and acts of enjoyment hereinafter mentioned were, in fact, adverse to the world, under claim of ownership by virtue of his said purchase. Kellar owned a large body of lands adjacent and contiguous to the above forty. In the fall of 1886, he verbally sold to Hull a half interest in his lands. They contained valuable stone suitable for quarrying, and in November, 1886, stating the case most strongly for the complainant, by joint act and arrangement, they, Kellar and Hull, by themselves and employes, went upon said forty acres, believing the same to be their property under Kellar's purchase at said judicial sale and by his contract to sell a half interest to Hull, and began the work of opening a quarry. They erected the necessary buildings, did the grading for a side track to the railroad, opened the quarry and

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entered upon the work of quarrying stone, expending about \$500 in the preparatory work. This possession was continued, and business prosecuted without abatement, under the same claim of right and ownership, taking out and disposing of stone daily, until the service of the injunction in this cause on June 15th, 1887.

With this possession and enjoyment of the premises and claim of ownership in force, the complainant, Bullington, on the 1st day of February, 1887, entered, at the land office at Huntsville, as a homestead, the north half of south-east quarter of said section 23, township 5, range 11 west, which, it is seen, includes the said forty acres. The only averment in the bill of possession taken by complainant under this entry is in the following language: "Soon after his said entry thereof he built a dwelling house upon said lands, and moved his family into the same, and ever since thereof your orator and his family have resided on said lands and are now residing thereon, and occupying said lands as a homestead." His only proof of his possession is his testimony, as follows: "After I entered the land the 1st day of February, I moved on it the 11th day of March, 1887, and have lived on it ever since. I live about one quarter of a mile from said quarry." A few days after the entry, complainant notified Kellar and Hull of the same, and not to get any more stone off the land. They refused to submit to this demand, but continued working the quarry and claiming the land as before, and Kellar instituted, before the proper tribunal, a contest of the validity of the entry, and prosecuted the contest to its final determination in 1891, when the validity of the entry was adjudged. Whilst the complainant and respondents were thus arrayed against each other, each in the assertion of title to the land, the complainant, on June 14, 1887, filed this bill to enjoin the further commission of the alleged trespasses, and for an account and recovery of the value of the stone taken. The chancellor granted the relief prayed, and from his decree the respondents appeal.

It is clear the averments of the bill and the proof thereunder, taken in connection with other averments and proof, touching the possession complainant took after his entry, do not show that the actual adverse possession by respondents of the land they held was displaced

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or disturbed by the possession which complainant took. The bill is not filed, concurrently with a real action at law to try the conflicting claims of title, in order to prevent the destruction of the estate, or irreparable waste and damage pending such a trial at law. In fact there is no averment or proof of facts from which it can be deduced that a virtual destruction of the estate, or injury thereto for which adequate redress can not be obtained in an action at law, would follow the continued possession and quarrying of stone by the respondents until an action at law could be tried. In the absence of averment and proof to the contrary, it must be assumed the respondents are solvent and able to respond in damages for the alleged trespasses. The bill seems to rest for its equity upon the mere conclusions of the pleader that a resort to equity is necessary to prevent irreparable injury and a multiplicity of suits, rather than any statement of facts to that effect. The register's report shows that from February 1st, 1887, to the service of the injunction. June 15, 1887, about 340 cubic yards of stone were quarried and disposed of. The value of this stone, as it lay in the bluff, is shown to have been about \$34. Its value at the quarry, after being put in shape for shipment, was about \$204, and at Sheffield, to where it was shipped and disposed of, \$1,293. It is also manifest, from the evidence, that the quantity thus quarried, through a space of four and a half months, was insignificant, as compared with the practically inexhaustible supply in the quarry. The conclusion, therefore, from the facts, if there were averments to the contrary, would be that no destruction of the estate or irreparable injury would follow the assertion of complainant's legal remedies, without resort to injunction. A real action at law, to try the disputed question of title and for the recovery of damages and mesne profits, would serve to settle, in one action, the title to the land, and to award to plaintiff, if successful, all damages, not only for mesne profits, but for injuries committed in the nature of trespass or waste, (Code, Chap. 6, Title I, Part 3); and those damages are recoverable to the time of the trial.—Code, § 2716. See also *Cooper v. Watson*, 73 Ala. 252; *Beatty v. Brown*, 76 Ala. 267; Sedg. & Wait Trial. of Tit. to Land, § 668.

High, in his work on injunctions, discusses very fully the subject of injunction to prevent trespass. In section

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698, he says: "To warrant relief * * * the party aggrieved must show a satisfactory title to the *locus in quo*, and, if the title be denied or in doubt, the injunction will generally be refused against a defendant in possession until the title is established at law. But in a strong case of irreparable mischief the rule has been departed from. And where the party aggrieved is in possession he will be allowed to restrain such trespasses as would result in irreparable damage in the event of refusing the relief. Equity will not, however, enjoin a trespass to realty when plaintiff's title is in dispute and has not been established at law, when no irreparable injury is shown. And where defendants are in possession alike with plaintiffs of the premises in controversy, and the title is doubtful and disputed, and it is not shown that plaintiffs have taken any steps to establish their title, and no reason is shown why they are not so doing, they will be denied an injunction. In such case a court of equity will not presume to determine the title to the property upon affidavits, and will not permit a temporary injunction to be granted which would operate as an action of ejectment." "A fundamental doctrine," says the same author in section 699, "underlying the entire jurisdiction of equity by injunction against the commission of trespass is, that where adequate relief may be had in the usual course of procedure at law, equity will not interpose by the extraordinary remedy of injunction." And he sums up in section 701 in the following language: "To warrant the interference of equity in restraint of trespass two conditions must co-exist: first, complainant's title must be established; and, second, the injury complained of must be irreparable in its nature. And to come within the rule the injury must be of such a nature as not to be susceptible of adequate pecuniary compensation in damages. Nor will equity interfere to restrain a trespasser simply because he is a trespasser, but only because the injury threatened is ruinous to the property in the manner in which it has been enjoyed, and will permanently impair its future enjoyment. And if the title to the *locus in quo* is in doubt, the injunction, if allowed at all, should only be temporary until the title can be determined at law." In section 700, the author says, that to warrant interference by injunction to prevent a multiplicity of suits, "there

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must be different persons assailing the same right, and the principles upon which the relief is granted have no application to a repetition of the same trespass by one and the same person, the case being susceptible of compensation in damages."

In *Jerome v. Ross*, 7 Johns Ch. 315, canal commissioners being authorized by statute to enter upon any lands contiguous to the canals, and to dig for stone and other materials necessary for the prosecution of their work, dug up and removed stone from a ledge of rock on complainant's premises, who thereupon filed a bill for injunction. Chancellor Kent, finally disposing of the case, said: "The objection to the injunction in cases of private trespass, except under very special circumstances, is that it would be productive of public inconvenience, by drawing cases of ordinary trespass within the cognizance of equity, and by calling forth, upon all occasions, its power to punish by attachment, fine and imprisonment for a further commission of trespass, instead of the more gentle and common law remedy, by action and the assessment of damages by a jury. In ordinary cases, this latter remedy has been found amply sufficient for the protection of property; and I do not think it advisable, upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong and aggravated instances of trespass which go to the destruction of the inheritance, or where the mischief is remediless." The complainant in that case was left to his remedy at law. It will be observed, too, in that case, that there was no question of complainant's title to the premises.

In the present case, as we have seen, respondents were in possession of the *locus in quo* claiming title, when complainant acquired his title by entry, and when he filed this bill. In the absence of some overruling equity, they had a constitutional right to have the validity of their claim of title tried in an issue to the country, before being disturbed in their possession and use of the premises. They were not obliged to yield to the mere notice and demand of an adverse claimant, although the superior title of such claimant may have appeared to be clear. They had the right to have the claimant put his title and their own to a legal test. There is scarcely ground for an argument that complainant was in danger

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of suffering destruction of his estate, or irreparable injury thereto. There is not a shade of doubt, under the evidence, that if every yard of stone had been removed from his land, payment to him of the fair value thereof, in money, would have afforded ample and adequate redress. We have shown that such payment could have been enforced, and the title to the land settled in one action at law. There was, therefore, no necessity whatever for resorting to injunction.

The maxim, "*Nullum tempus occurrit reipublicae*," has no application to this case. It is true there can be no adverse possession of land which can ripen into title against the government; and the doctrine of maintenance does not apply against it. Those are questions which pertain to the trial of the title when jurisdiction for that purpose has been properly invoked. Here the complainant has sought the wrong forum. In an action at law he may have the benefit of those immunities, if entitled to them.

Reversed and remanded.

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Bill in Equity by Assignee to have the Trust under a Deed of Assignment dismissed.

1. *Right of assignee to invoke jurisdiction of equity for the administration of the trust.*—When, after the execution of a deed of assignment by an insolvent debtor for the benefit of all his creditors, the lessor of the debtor sues out a writ of attachment and has it levied upon a portion of the property conveyed in said deed, the assignee named in the deed may invoke the aid of equity to administer the trust created thereby.

2. *Right of court of equity to order sale of property assigned.*—After a court of chancery has taken jurisdiction of the trust created by deed of assignment, it has the power to order a sale of the property assigned in said deed and such power extends over a leasehold interest in a store, which was conveyed in the deed of assignment, as well as to the other property assigned.

3. *Right of creditors to be made parties defendant by petition to a sui*

201	273
101	309
102	262
101	273
109	476
101	273
124	686

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by assignee.—Creditors of an insolvent debtor can not be made parties defendant, by their own petition, to a suit by the assignee in a deed of assignment made by an insolvent debtor for the benefit of his creditors; but being beneficiaries of the trust created by said deed, they may intervene by petition to have their interest ascertained and their rights protected.

4. *Decree before cause at issue erroneous.*—When, to a bill filed by the assignee of an insolvent debtor, which avers the levy of an attachment by the debtor's lessor and admits the justness of a claim for rent thus asserted, there have been no answers filed, and no decrees *pro confesso* have been rendered against the defendants not answering, the cause is not at issue; and an order of reference to ascertain the amount due the attaching lessor, and a decree that the amount so ascertained be paid is erroneous when rendered before the cause was at issue, and before the creditors of the assignor had an opportunity of presenting and proving their claims.

5. *Decree to support an appeal.*—A decree that settles matters of contention and the material equities in a cause will support an appeal.

6. *Same.*—An appeal lies from a decree in a suit by an assignee named in the deed of assignment for the execution of the trust, in which the debt is ascertained and ordered to be paid out of the proceeds of the assets, without giving creditors an opportunity to contest such debt, or to present and prove their claims.

7. *Right of intervening creditors to appeal.*—Creditors who have intervened by petition, to have their interest ascertained and rights protected, in a suit by the assignee of an insolvent debtor, may take an appeal from a decree which orders to be paid to the lessor of the debtor the amount ascertained to be due, when such decree is made without giving the intervening creditors an opportunity to contest such debt, or to present and prove their own claims.

8. *When appeal not taken in the name of all the defendants; not dismissed upon objection raised in argument.*—When an appeal is taken by intervening creditors, not in the name of all the defendants, and without a severance, and the cause is submitted without objection on assignments of error by the appellant, the objection that the appeal was not taken by all the defendants comes too late when suggested in argument.

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. THOMAS COBBS.

The bill in this case was filed by the appellee, S. Brown, as assignee, to have the chancery court take jurisdiction of, and administer, a trust created by a deed of assignment.

On January 20th, 1892, I. Phillips & Bro. made a general assignment for the benefit of their creditors to S.

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Brown, the appellee, and complainant in this suit. In said deed of assignment the assignors transferred all of their stock of merchandise and also their leasehold interest in storehouses Nos. 1816 and 1818, 2d Avenue, in the city of Birmingham, then occupied by them. The said storehouses, the leasehold interest in which had been conveyed in the deed of assignment, had been leased by I. Phillips & Bro. for a term of years from Mrs. L. L. Molton. The said lease contained the following provision: "Should the party of the first part (I Phillips & Bro.) fail to pay the rents as they become due, as aforesaid, or violate any other condition of this lease, the said party of the second part (Mrs. L. L. Molton) shall then have the right, at her option, to re-enter the premises and annul this lease." As soon as the assignment was made, Mrs. L. L. Molton, the landlord, sued out an attachment to recover the rent for the entire term, and the writ was levied upon the stock of goods conveyed to Brown in the deed of assignment. On January 29, 1892, after the levy of said writ of attachment, S. Brown, as assignee, filed the present bill of complaint against I. Phillips & Bro., L. L. Molton, and A. Dreher, one of the creditors of I. Phillips & Bro., and prayed to have the chancery court to take jurisdiction of the trust and trust estate created by the deed of assignment, and administer the same under the orders and directions of said court; that the goods levied upon by the landlord be sold by the complainant under the orders of the chancery court, instead of by the sheriff; and that the proceeds be held, in lieu of the goods, subject to any priority of lien that the said landlord might have. None of the creditors or beneficiaries under the deed of assignment were made parties defendant, except A. Dreher, who was a resident of this State. The only averment in reference to the other creditors is found in the sixth paragraph of the bill, and is copied in the opinion. On January 30, 1892, the chancellor decreed that the chancery court assume jurisdiction of said trust, and take control and custody of the trust estate, and that the said Brown, as assignee, be required to give bond in the amount of \$50,000. This bond was made and approved. The complainant, as assignee, then filed his petition in said cause, setting forth the levy on the stock of goods of said attachment by the landlord for her rent, amounting to \$9,200, which

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was admitted by petitioner to be a valid lien on the goods, and praying for an order of the court authorizing him to sell said leasehold interest in the rented premises and the stock of goods to the highest bidder for cash, after giving 10 days notice, &c., and that the proceeds be held by the petitioner, first for the payment of said rent, and the balance held to be administered under the orders of the chancery court. On the 11th of March, 1892, this petition was granted by the court, and the petitioner was authorized and directed to sell the leasehold interest and the goods assigned to him according to the prayer of the petition. On March 22, 1892, S. Brown filed his report setting out that, after publication as required by the decree, he had sold the entire stock and furniture and the leasehold interest to one Louis Burger for the sum of \$16,120. On March 23, 1892, a decree was rendered by the chancellor ordering a reference to the register to ascertain and report upon the fairness of the sale, and what portion of the proceeds of the sale should be applied to the payment for the rent of said premises, for which the landlord holds a lien upon the goods conveyed in the deed of assignment. On March 25, 1892, appellants, Louisville Manufacturing Co. and Hunt Manufacturing Co., filed their petition in said cause and asked that they might come into said suit as parties defendant, and "file answers, pleas or demurrers, and to do everything necessary for the protection of their rights and interests, as if they were made parties defendant in said suit by complainant." The complainant demurred to this petition on the ground that the petitioners have shown no right to come in as parties defendant. The court sustained the demurrer of the complainant to this petition, but gave the petitioners leave to file their claims by petition, and have their interest ascertained and their rights protected. On March 28, 1892, the Louisville Manufacturing Co. and the Hunt Manufacturing Co. filed their petitions as allowed by said decree. On March 29, 1892, the register made his report in favor of the fairness of the sale, and ascertained that "If said rent is to be paid at once in cash, instead of in monthly instalments, according to the lease, then the said landlord should be paid the sum of \$8,313.25." He also reported that by the averments of the lease, a reasonable attorney's fee was due for the

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enforcement of such contract, and that \$460 was a reasonable fee for services rendered in the attachment suit brought on said lease, and that the cost of the attachment suit was \$350.15, and that, therefore, the total amount due on the contract of lease was \$9,123.40. The register also reported that he had refused to allow the Louisville Manufacturing Co. and the Hunt Manufacturing Co. to cross-examine witnesses called by complainant on said reference, or to offer evidence in chief on the issues directed to be made by the said decree of reference. The Louisville Manufacturing Co. and the Hunt Manufacturing Co. filed exceptions to this report of the register, on the ground that they were not allowed to take part in said reference. Thereupon, the chancellor decreed that the report be set aside, and ordered the register to re-execute said reference, and to permit the said petitioners to participate therein. On April 8, 1892, the register again executed said reference, reported again in favor of the fairness of the sale, and reported the same amounts as the correct amounts to be applied to the landlord's claim. The petitioners, the Louisville Manufacturing Co. and the Hunt Manufacturing Co., filed exceptions to this report of the register, ascertaining the amount which should be applied to the payment of the landlord's rent, on the ground that only the amount which was due at that time should be allowed. On April 11, 1892, the chancellor overruled the exceptions of the Louisville Manufacturing Co. and the Hunt Manufacturing Co. to the report of the register, and confirmed said report, and decreed that the sum of \$8,313.25 should be paid to L. L. Molton, the lessor, at once. The Louisville Manufacturing Co. and the Hunt Manufacturing Co. prosecute the present appeal, and assign as error the several rulings and decrees of the chancellor, as shown above.

MOUNTJOY & TOMLINSON and GARRETT & UNDERWOOD, for appellants.

LANE & WHITE, *contra*.—(1.) The petitioners could not have been made parties defendant.—*Renfro Bros. v. Goetter, Weil & Co.*, 78 Ala. 311; *Ex parte Printup*, 87 Ala. 148, 6 So. Rep. 418. (2.) Appellants had no right to prosecute the appeal.—*Harper v. Bibb*, 45 Ala. 670; *May v. Courtney*, 47 Ala. 185.

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HARALSON, J.—1. The first assignment of error is, that the court below erred in taking jurisdiction of the administration of the trust, as created in the deed of assignment. A trustee has the undoubted right to come to a court of equity, for its assistance and protection, in all cases of doubt or difficulty, in the administration of the trust; and the bill in this case makes a clear case for equitable interposition, for the protection and direction of the trustee in the discharge of his duties, as such. Perry on Trusts, § 928; Hill on Trustees, § 543.

2. The second assignment questions the power of the court to order a sale of the property assigned. When the trust is before the court, by a bill filed for its execution, the whole matter of the trust and its proper execution is within its jurisdiction, and the trustee must proceed as directed. He can not sell, without the sanction of the court, even if the deed of trust gives him the express power to do so. He must sell as directed by the court.—Perry on Trusts, §§ 764, 770, 928.

In this case, the leasehold interest of the store, was included in the deed of assignment for the benefit of creditors, as well as the goods and merchandise in the store, and no distinction can be drawn between the two, as to the power of the court to order their sale.—Perry on Trusts, §§ 449, 450, 547.

3. The fourth assignment is a complaint against the action of the court, in sustaining a demurrer to the appellants' petition to be made parties defendants to the cause.

The court committed no error in refusing to grant the petitions of appellants, to be made parties defendants, for the purposes specified therein. It conformed its rulings to the principles of chancery practice, and allowed appellants, as beneficiaries of the trust fund, to intervene by petitions, and propound their respective claims—"to have their interests ascertained, and their rights protected." Under this order, they may prove and have their own claims allowed, and may resist the claims of any or all of the creditors of the assignors, which is all they can demand.—*Ex parte Printup*, 87 Ala. 148, 6 So. Rep. 418.

4. The third and fifth assignments, relate to the action of the court, (1) in ordering a reference to ascertain the amount of the rent due and payable to Mrs. L. L. Molton; and (2), in decreeing that the amount ascertained by the register, on the reference, should be paid

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out of the proceeds of the sale of the stock of goods sold, and the sale of the leasehold interest.

It is true, generally, that a decree on any of the merits of the case, rendered before the defendants are in default for want of answers, or before decrees *pro confesso* have been entered against them, is premature, and should never be made. It was irregular and contrary to the practice in such cases for the court to have ordered the register to ascertain the amount of the debt due to L. L. Molton for rent, and to have decreed its payment, before the cause was at issue. These were matters of essential merit, which the defendants and creditors had a right to contest. The proper and usual practice in such cases is, after answers filed, or decrees *pro confesso* against such as have not answered, to give reasonable notice by publication for all the creditors to file and prove their claims by a specified day, or they will be barred, and on the day named in such notice, for the register to pass upon all claims presented and filed, each creditor having the right to contest the claim of every other one, and for the register to report to the court, the result of his inquiries, with all objections and exceptions which may have been made to his rulings, together with all the evidence taken; and to this report, when made, all parties should have the right to except, before the court makes its decree passing on the merits of any disputed claim.—*Morton & Bliss v. New Orleans & Selma Railway Co.*, 79 Ala. 590; *McDonald v. McMahon*, 66 Ala. 115. Any proceeding, which deprives a person of his property, and its control, or adjudicates his rights without notice and the opportunity of being heard in opposition, is *coram non judice*, as to such person.—*Ex parte Trice*, 53 Ala. 548; *Dugger v. Tayloe*, 60 Ala. 504.

The trustee, in filing his bill, admitted this debt of L. L. Molton to be a first lien on the assigned property, and was active in procuring the orders of the court to have it ascertained and paid, without notice to the creditors, the real parties in interest. The only defendants he made parties to his bill were I. Phillips & Brother, the assignors, who had no real interest, Mrs. L. L. Molton, an adversary with whom the assignee was not at variance, and a single creditor, A. Dreher, who lived at Cullman. The bill states, "that the other creditors are very numerous, and can not, without manifest incon-

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venience and oppressive delays in this suit, be at this time brought before this honorable court, the most of them being non-residents of the State of Alabama, and their residences unknown." But, it was proffered, that "as soon as all their respective names and residences could be ascertained, they would, according to law, and the rules and practice of the court, be made parties defendants to the bill of complaint."

When the appellants sought, as creditors to come in and be made parties defendants to the suit—in compliance with the proffer in the bill for them to do so—that they might answer, plead or demur and do every thing necessary for the protection of their rights and interests, as if they had been made defendants in the beginning, they were resisted in their application by the trustee; and, on the execution of the first reference to the register, which was to ascertain L. L. Molton's claim for rent, and how it should be paid, and which involved inquiries and a report as to the main matter of contest in the case, when appellants appeared before the register and asked to be allowed to cross-examine the witnesses called by the complainant, and to offer evidence on the issues made by the decree of reference, the complainant, the assignee, objected, and the register sustained the objection—the assignee and the register proceeding upon a mistaken discharge of their duties, respectively. The court, it is proper to state, set aside the report of the register, on account of that ruling, and ordered a new reference, the same as the other, upon the execution of which appellants were allowed to appear. Even then, they encountered the assignee as an adversary. The assignee possibly feels interested to have that debt allowed, as he may suppose he may be personally liable for it.

There was no error in the court ordering the assignee to sell the goods and the leasehold estate, and hold the proceeds subject to the orders of the court; but there was error in decreeing on the merits of the cause before it was at issue, in having the Molton debt ascertained and in ordering it paid, and the decree, to that extent, must be reversed and set aside.

5. We stated in *Adams v. Sayre*, 76 Ala. 517, that it was the settled doctrine of this court, that, as a general rule, there can be but one final decree upon the merits

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of a chancery cause, which is required to settle all the equities litigated, or necessarily involved in the issues of the particular suit; that the policy of the rule is founded in the indisposition of appellate courts to multiply appeals, by undertaking "to review litigated cases piecemeal." But we held, that a decree may, nevertheless, be partly final, and partly interlocutory; final, so far as it determines all issues of law and fact, constituting the equities proper in the cause, and interlocutory as to ulterior proceedings regulating its mode of execution, from each of which, an appeal will lie to this court.—*Thornton v. Highland Av. & Belt R. R. Co.*, 94 Ala. 353; 10 So. Rep. 442; *Morton & Bliss v. N. O. & S. R. R. Co.*, 79 Ala. 590.

The decree in this case, so far as it goes, settled matters of contention and the material equities in the cause, and is such a decree as supports an appeal.

6. The appeal is taken by two of the creditors, who intervened by petition, and who were authorized to take it.—*Jones v. Wilson*, 54 Ala. 50; *Weaver v. Cooper*, 73 Ala. 318.

It was taken in their names alone, and the point is now made, that it should be dismissed because not prosecuted in the name of all the defendants, and without a summons and severance. A sufficient reply to this, if any were needed is, that the cause was submitted without objection, and no motion was made to dismiss the appeal, for the reasons assigned, and it is too late for appellees to suggest in argument, as they do, that the appeal is improperly here.—*Vaughan v. Higgins*, 68 Ala. 548.

7. It would be premature at this time, for us to pass upon the merits of Mrs. Molton's claim or that of her assignee for rent. It was prematurely considered and passed on in the court below. The cause must be reversed and remanded, that the chancery court may order a new reference, in the manner indicated in this opinion, to require all creditors to present and prove their claims, to ascertain what debts there are, and afterwards to make distribution of the trust fund.

Reversed and remanded.

Bates v. Morris.

Statutory Claim Suit.

101	282
101	320
101	282
100	532

101	282
111	306
112	23
113	576

101	282
123	26
123	28
123	29
123	30
123	31

101	282
127	179

1. *Conveyance attacked as fraudulent; relevant evidence.*—On an issue formed questioning the *bona fides* of a transfer of property, in payment of an alleged indebtedness, if the debt is established as real, the pivotal question is whether there was such disparity between the value of the property transferred and the amount of the debt as to be indicative of fraud; and in determining this question, the evidence of the market value of the transferred property is relevant and admissible.

2. *General objections to evidence.*—When there are only general objections to evidence, without specifying the particulars in which it is objectionable, such objections are properly overruled, unless the evidence is plainly illegal or irrelevant.

3. *Failure to introduce witness; does not justify an unfavorable inference.*—Where a person, whose evidence would be competent for either party in an action, was in court during the trial and equally accessible to both parties, it is error to charge the jury that they could draw an unfavorable inference against one of the parties for failing to call such person as a witness; and this is true notwithstanding the witness referred to was the husband and grantor of the claimant in a claim suit, where the transfer from him is attacked as fraudulent.

4. *Earnings of wife; separate estate therein.*—Prior to the act approved February 28, 1887, by which the earnings of the wife were made her separate estate, the husband could, by contract, gift or renunciation of all right to them, invest the wife with a separate estate therein; and while such voluntary gift or renunciation is not valid as against the husband's existing creditors, it is valid as to subsequent creditors, unless shown to have been infected with actual fraud.

APPEAL from Birmingham City Court.

Tried before the Hon. H. A. SHARPE.

On February 18, 1887, W. E. Bates became indebted to Mary Morris; and on his failure to pay said indebtedness, she brought suit against him and obtained judgment thereon in the sum of \$100, on April 26, 1890. Execution having been returned "no property found," garnishment was issued on the judgment on July 21, 1891, and served on St. Pierre Bros. In their answer the garnishees acknowledged indebtedness to W. E. Bates, but suggested that the money in their hands was claimed as

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the property of Cora Bates. After having been duly served with notice, Cora Bates interposed a claim to the money in the hands of the garnishees. She based her claim upon the following facts, which her testimony tended to show: Prior to 1887 the claimant earned certain money by her own labor, and, with the husband's consent, was allowed to have and enjoy the proceeds thereof. This money, together with other money which she obtained from her brother, amounting in the aggregate to \$3,500, she loaned to her husband, W. E. Bates, the defendant in the original suit. On February 25, 1889, her husband, W. E. Bates, being unable to pay her the money borrowed, and being, as she testified, an intemperate and improvident man, at her solicitation he conveyed to her in satisfaction of said indebtedness, his undivided one-half interest in the leasehold interest and rights to certain premises, which had been rented to St. Pierre Bros., the garnishees. There was also testimony for the claimant that the debt was the full value of her husband's interest in the leasehold estate. There was testimony for plaintiff tending to show that the property interest conveyed exceeded in value the amount of the indebtedness. The claimant was in actual possession of the premises rented and occupied by garnishees from said 25th day of February, 1889, down to the time of this litigation, and had collected the rent for the same. It was shown that the said lease had yet to run a little more than 7 years from the date of the trial. There was also evidence introduced for the plaintiff in the original suit tending to show that at the time of making the deed to his wife of the leasehold interest, W. E. Bates was insolvent; but this fact was not shown to have been known by his wife. The plaintiff in the original suit introduced one Miles, who, after having testified that he was acquainted with the market value of real estate in Birmingham when the conveyance was made to claimant by W. E. Bates, was asked this question: "What, on February 24th, 1889, was the market value of the leasehold interest in the premises, made and referred to by the witnesses as belonging to the claimant, running nine years and bringing in a rental of \$1,424 net, for half interest, with buildings belonging to lessee at termination of lease?" The claimant objected to this question, and duly excepted to the court overruling her ob-

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jection. Upon the witness answering \$12,000, the claimant objected to the answer, and duly excepted to the court overruling her objection. The claimant assigned no special grounds of objection to this evidence. W. E. Bates, the husband of the claimant, and the defendant in the original suit, was present during the trial of the cause, but was not called as a witness by either party and did not testify.

Upon the introduction of all the evidence, the claimant requested the court to give, among others, the following written charges: (5.) "The court charges the jury that the mere fact that claimant failed to introduce her husband as a witness in this case is not to be considered by the jury as a circumstance against her, but it is a circumstance that can be considered by the jury for or against her as they may see fit under all the evidence in the case." (7.) "Even if the jury believe from the evidence that in making the conveyance to his wife, which was introduced and read to the jury, W. E. Bates intended to defraud his creditors this would not affect the claimant to the property so conveyed, unless she participated in the fraud." The court refused to give each of these charges, and the claimant duly excepted. The court at the request of the plaintiff, gave the following written charges to the jury, and the claimant separately excepted to the giving of each of them: (1.) "The jury are charged that, before the plaintiff can be defeated in this action, the claimant must show that the transaction between the claimant and her husband, namely, the conveyance made by him to her of the property in controversy, was for a fair and valuable consideration, and that in determining whether such transaction was fair and just, they can look to the fact that W. E. Bates was not examined as a witness in this trial." (2.) "I charge you, gentlemen of the jury, that if you believe from the evidence that the transfer of the property in controversy, made by W. E. Bates to his wife (the claimant) was made for the purpose of hindering, delaying or defrauding the creditors of W. E. Bates, you must find for the plaintiff." (3.) "I charge you, gentlemen of the jury, that prior to February 28, 1887, the incomes or profits of the wife's estate or property, and the earnings of the wife belonged to the husband and not to the wife."

There was judgment for the plaintiff. Claimant brings

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this appeal, and assigns as error the ruling of the court in admitting in evidence the testimony of the witness Miles, and giving and refusing the respective charges asked.

LANE & WHITE for appellant.—Charge 1 given at the request of the plaintiff was erroneous, while charge 5 asked by the plaintiff should have been given.—*Pollak v. Harmon*, 94 Ala. 420, 10 So. Rep. 156; *Roney v. Moss*, 74 Ala. 393; *Catlin v. Gilders*, 3 Ala. 545. The conveyance of Mr. W. E. Bates to the claimant was in settlement of a *bona fide* debt, and at a fair valuation, and the transaction was legal, and should be upheld by the court. *Hornthall v. Schonfeld*, 79 Ala. 107; *Hodges v. Coleman*, 76 Ala. 105. The earnings of the claimant, by the husband's consent, became her separate estate, and he, becoming indebted to her for such earnings and other money loaned him by her, had the right to transfer a leasehold interest, in payment of such debt, and such transfer was valid as to all subsequent creditors.—*Pinkston v. McLemore*, 31 Ala. 311; *Peterson v. Mulford*, 36 N. J. Law, 481.

GREGG & THORNTON, *contra*.

STONE, C. J.—The issue formed between the parties questioned the *bona fides*, as to the creditors of the husband of the appellant, of the transfer he had made to her of his right and interest in the lease executed to him and Beasley by James Wilson and Minnie Constantine. The transfer purports to have been made in consideration, and for the payment of an antecedent indebtedness of the husband. If the debt was real, the pivotal inquiry was whether there was such disparity between its amount and the value of the leasehold interest, as to be indicative of fraud; whether the appellant had bargained for and received over-payment, or payment in excess of her just demand.—*First National Bank v. Smith*, 93 Ala. 97, 9 So. Rep. 548; *Pollock v. Meyer*, 96 Ala. 172, 11 So. Rep. 385. To this inquiry, the evidence of the witness Miles was directed, and we do not perceive that it is subject to any just objection. If the question eliciting the evidence was in form objectionable, or, if its hypothesis was, as is here insisted, broader than the evidence

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to which it refers, this was matter of special objection, which, if it had been made, would have been removed. The objection to the question, and to the evidence was general and indefinite. Such objections are not favored, and if the evidence is not plainly illegal or irrelevant, the trial court commits no error in overruling them.— *Wallis v. Rhea*, 10 Ala. 453; *Sanders v. Knox*, 57 Ala. 81; Rule of Practice, 90 Ala. p. IX.

The first instruction given to the jury at the request of the appellee is not very clearly expressed. As we construe it, as matter of law, it asserts, that the failure to examine the husband as a witness, should be regarded as a fact or circumstance tending to the proof or disproof of the matter in dispute. It may be, that it was intended to assert no more than that the failure to examine the husband was matter of inference or presumption unfavorable to the appellant, in weighing the other evidence. In either point of view, we deem the instruction erroneous. The husband was in court, accessible to either party, and a competent witness to the same extent for the one party, as for the other; and it is difficult to assign any just reason for imputing the failure to examine him as a witness, as matter of evidential inference, or as ground of unfavorable presumption for or against the one party, which would not apply to the other. To neither can be imputed the withholding or suppression of evidence; and all that can be properly said is, that neither deemed it necessary to add the evidence of the husband touching the matter in dispute. The question was considered in *Scovill v. Baldwin*, 27 Conn. 316, and it was said by the court: "The circumstance that a particular person, who is equally within the control of both parties, is not called as a witness, is too often made the subject of comment before the jury. Such a fact lays no ground for any presumption against either party. If the witness would aid either party, such party would probably produce him. As he is not produced, the jury have no right to presume anything in respect to his knowledge of any facts in the case, because they are to try the case upon the facts shown in the evidence, and upon them alone, without attempting to guess at what might be shown, if particular persons were produced by the parties." Cases arise in which material facts lie exclusively within the knowledge of a particular

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person. If such person is accessible, and is not produced and examined, the party claiming benefit from the facts must generally fail from a want of evidence. And cases may present themselves in which a person having peculiar knowledge of facts, from which a party claiming to derive benefit, is accessible to such party, and not to his adversary. If such person is not produced and examined, a presumption may arise that the facts do not exist.—Lawson on Presumptive Ev., 120, *et seq.* Such presumption is, however, indulged with great caution, and only when it is manifest the evidence is within the power of the one party, and is not accessible to his adversary. The husband was a party to the transaction impeached, and it may be, the principal actor in it, of necessity having full knowledge of all the facts attending it. The appellant was the other party, having equal knowledge, and was examined. There is no room for any inference that she had omitted the statement of any material fact to which the husband would have testified; or, that his evidence would not have been merely cumulative, corroboratory of the evidence she had given. If it was supposed there was any fact within his knowledge of which there was not evidence; or that so far from corroborating he would, in any respect, have contradicted the evidence of the appellant, in support of the transaction, the appellee ought to have examined him. Not having examined him, there is no room for any conjecture or speculation as to the character of the evidence he might have given; nor any just reason for unfavorable inference against the appellant. If she had called the husband, and he had corroborated the evidence in support of the transaction, his credibility would have been assailed because of his relation to the appellant and to the transaction. This being true, the appellant ought not to suffer by reason of the failure to examine the husband. Similar instructions have been considered and repudiated by this court.—*Patton v. Rambo*, 20 Ala. 485; *Jackson v. State*, 77 Ala. 18; *Carter v. Chambers*, 79 Ala. 223; *Pollak v. Harmon*, 94 Ala. 420, 10 So. Rep. 156. The last case cited is not in any respect distinguishable from the present one, and the instruction requested and refused differs from the instruction we are considering, only in being more clearly expressed. It was said by CLOPTON, J., citing the case of *Scovill v. Baldwin*, *supra*:

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"Both the grantors in the bill of sale were in court, and equally in the control of both parties. In such case, the jury, being in duty bound to determine the case on the facts shown and the evidence actually introduced, have no right to presume what would have been shown, had the grantors in the bill of sale been examined as witnesses."

It is not necessary to notice separately and particularly, the instructions given or refused, the subject of the remaining assignments of error. The controversy between the parties involved only plain, well settled principles of law. Prior to the act of 28th of February, 1887, the earnings of the wife were not her separate property. The common law prevailed, and her earnings belonged to the husband. By contract with her, or by gift, or by renunciation of all right to them, suffering her to retain them, the husband could invest the wife with a separate estate in such earnings which a court equity would protect. But such gift, or such voluntary renunciation, the equivalent of a gift, was not valid as against the existing creditors of the husband, for the same reason that any voluntary conveyance would be void as to the existing creditors of the donor. As to subsequent creditors, such a gift or renunciation was valid, unless it was successfully assailed for intentional fraud.—*Pinkston v. Mc-Lemore*, 31 Ala. 308; *Wing v. Roswald*, 74 Ala. 346. The evidence of such gift or renunciation, must have been clear, and it must have been apparent that the husband intended to divest himself of the right to her earnings, and to set them apart to the separate use of the wife.—*Carleton v. Rivers*, 54 Ala. 467. If it be shown that the husband gave or renounced to the appellant her personal earnings, and that by her thrift and industry she acquired moneys, which were loaned to, or used by the husband, by the loan or use he became indebted to the appellant, and the debt would form a valuable consideration for the sale or conveyance of property to her. If at the time of such gift or renunciation, the debt of the husband to the appellee had not been created, as to her the gift or renunciation is valid, unless it is shown to have been infected with actual fraud.—*Huggins v. Perrine*, 30 Ala. 396. But although it may appear that the appellee was a subsequent creditor of the husband, if her claim existed at the time of the transfer of the leasehold interest to the

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appellant, the transfer can not be supported, if it be shown that the value of the interest transferred was so materially in excess of the amount of the indebtedness of the husband, that the legitimate boundary of securing payment of the debt was passed, and there was intentional bargaining for and receiving over-payment.—*Pollock v. Meyer*, 96 Ala. 172. 11 So. Rep. 335, and authorities cited. An observance of these well settled principles will lead to a proper determination of the controversy and of the right of the parties.

Reversed and remanded.

Turner Coal Co. v. Glover, (Two Cases.)

Action to recover Statutory Penalty for Willfully and Knowingly cutting Trees from the Lands of Another.

1. *Demurrer; specification of cause.*—A general demurrer, which does not distinctly state some particular objection, can not be considered.

2. *Same; when the grounds specifically considered.*—When a demurrer specifies some particular ground of objection, the pleader is supposed to have waived all others, and however insufficient the pleadings may be in other respects, if they are not subject to the objections specifically assigned, the demurrer must be overruled.

3. *Necessary averments in complaint to recover penalty under section 3296 of the Code; action of debt.*—In an action brought to recover the penalty imposed by section 3296 of the Code, a complaint which avers that the plaintiff is the owner of the land upon which the trees were cut, the number and description of the trees, and that they were willfully and knowingly cut by the defendant without the plaintiff's consent, contains all the facts required to be alleged by the statute, and will be treated as an action in debt.

4. *Who may maintain action for statutory penalty for cutting trees.*—The right of action to recover the statutory penalty for cutting trees, (Code, § 3296), is given not to the person in possession, but to the owner of the land, whether he was in possession or not at the time the trespass complained of was committed.

5. *Demurrer to a plea; when properly sustained.*—In an action to recover the statutory penalty for willfully and knowingly cutting trees, the defendant pleaded by special plea that there was conveyed to him by mesne conveyance, from one seized of the lands upon which the trees were situated, "the coal, iron ore, and other minerals on the lands, together with the right to enter on the lands and open drifts,

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100	308
101	289
112	544
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124	466
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135	515
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slopes and shafts for the purposes of mining, and also of the timber and water upon the same, necessary for the development, working, and mining of said minerals, and the preparation and removal of the same for market, and the right to build roads over the same, necessary for convenient transportation of the mineral products," and that the defendant entered upon the plaintiff's alleged possession, "as lawfully it might in the manner complained of by said plaintiff, and cut timber, as lawfully it might." *Held*, this plea is open to demurrers which raise the objection that it did not aver that it was necessary to cut the said timber for the development, working and mining of the minerals upon the lands, and it did not aver that said timber was cut and used for the purposes of developing, working and mining the minerals, and preparation of the same for market.

6. *Pleadings; demurrer to replication.*—In an action to recover the statutory penalty for willfully and knowingly cutting trees, when the defendant by special plea sets up that at the time of the trespass complained of he had the right to cut the said trees, by reason of a purchase by him from the grantee of the one seized of the lands upon which the trees were situated, a replication by the plaintiff to said plea, which avers, that at the time of the pretended sale to the defendant's vendor, the one making such attempted sale did not have the title or right to said trees, or to the surface of the land whereon said trees were located, and that the right and title to the same were in the plaintiff, is not demurrable on the grounds that the said replication brings the plaintiff's title into question, and that it is inconsistent with the complaint in which the plaintiff claims a fee simple title to the land.

7. *Application for new trial.*—On application for a new trial by defendant, after final judgment at law, on the ground of newly discovered evidence, the petition must show that the defendant was prevented from making the defense shown by the newly discovered evidence, by surprise, accident, mistake or fraud, without fault on his part.

8. *Execution of mortgage by plaintiff no defense to action to recover statutory penalty for cutting trees.*—Against all persons except the mortgagee, the mortgagor, whether before or after default, is regarded as the owner of the property mortgaged; and therefore, in an action to recover the statutory penalty for willfully and knowingly cutting trees, the fact that the plaintiff had executed a mortgage on the land from which the trees were cut to a third person constitutes no defense for the defendant, who claims no right under said mortgage.

APPEAL from the City Court of Birmingham.

Tried before the Hon. W. W. WILKERSON.

This was an action brought by John F. Glover against the Turner Coal Company, under section 3296 of the Code, to recover the statutory penalty for willfully and

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knowingly cutting down and destroying a large number of trees, alleged to be upon the lands of the plaintiff.

As originally filed the complaint contained five counts. In the first count the plaintiff claimed of the defendant \$4,000 "for willfully and knowingly, and without the consent of the plaintiff, and in violation of section 3296 of the Code of Alabama, cutting down, destroying and taking away four hundred pine, oak, poplar, walnut and hickory trees and saplings in the months of June, July, August, September, October, November and December, 1891," from certain described property, "which said lands were not at that time, and are not now the property of the defendant, but were and are the property of the plaintiff." By the second count the plaintiff claims of the defendant "the further sum of \$2,000 as damages for willfully and knowingly and without plaintiff's consent, and in violation of section 3296 of the Code of Alabama, having cut down and destroyed 200 pine trees which were on the land described in the first count," &c. In the third count the plaintiff claimed of the defendant, under similar allegations, the like sum of \$2,000 for cutting down and destroying 200 oak trees and saplings. By the fourth count, under similar allegations, the defendant claimed of the defendant the like sum of \$2,000 as damages for cutting down and destroying 200 pine and oak trees and saplings. By amendment the fifth count of the original complaint was stricken out, and the sixth, which was in the following language, was supplied therefor: "And the plaintiff claims of the defendant the further sum of \$2,000, the value of timber cut down, destroyed and converted by the defendant to his own use from the lands of the plaintiff as particularly described in the first count of the complaint, to-wit: 400 trees and saplings in the months of April, May, June, July, August, September, October, November and December." The plaintiff demurred to the complaint as amended upon the grounds that "there is a misjoinder of counts, in that the 1, 2, 3 and 4 counts are in debt and the sixth in assumpsit." This demurrer was overruled by the court, and the defendant then interposed a special plea, the substance of which is set out in the opinion. The plaintiff demurred to this plea upon several grounds. The 6th and 7th grounds are set out in the opinion. Upon the court sustaining the demurrer interposed by the plain-

tiff, the defendant amended his plea, and thereupon the plaintiff filed his replication to said plea which is copied in the opinion. The defendant demurred to the plaintiff's replication on the following grounds: 1st. That it traverses the color of title given to plaintiff by defendant which is not traversable. 2d. That it brings plaintiff's title into question which is not allowable in this action. 3d. That said replication is inconsistent with the declaration, in that it claims the surface only, whereas the declaration claims the land in fee-simple, and that it claims more land than the declaration. The court overruled this demurrer to plaintiff's replication; and thereupon the defendant declined to take issue upon it, or in any way plead to said declaration. The judgment entry then recites that, "Therefore, it is considered and adjudged by the court that the plaintiff is entitled to recover of the defendant the damages in this behalf sustained; but the amount thereof being uncertain, and it appearing to the court that in this cause a jury having been waived, as by the statutes in such cases made and provided, now, upon plaintiff's motion, the court proceeds to hear and determine this cause upon the proof produced by the plaintiff." Among the evidence then introduced there was a deed from C. T. Lantrip to John F. Glover conveying the land involved in the suit from which the trees were cut; and there was also introduced a deed from John F. Glover to M. A. Glover and one from M. A. Glover to John F. Glover, conveying the same lands.

There were rulings of the court upon the defendant's objections to the introduction of these deeds in evidence, and also to the introduction of other evidence; but the opinion renders it unnecessary to notice them in detail. Final judgment was rendered for plaintiff, assessing his damages at \$2,000. The defendant appeals, and assigns as error the several rulings of the trial court.

The other cause (No. 322) is an appeal from the court overruling and denying a petition of the defendant for a new trial. The ground of this petition was, that at the time of the trial of the cause, and at the time of the cutting of the trees involved in the suit, John F. Glover and his wife had conveyed the lands upon which were situated the trees by a mortgage to one W. F. Peterson, and that, therefore, John F. Glover, the plaintiff in the suit, had no title thereto. The plaintiff demurred to the

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tion, on the ground, that it did not aver that the defendant was prevented from making his defense at the time of the cause by surprise, accident, mistake or fraud; and did not set up any facts or fact showing in what way surprise, accident, mistake or fraud prevented the defendants from making the defense. John F. Glover, in response to the petition, filed his affidavit in which he avers that the mortgage referred to in the petition had been paid and satisfied in full, and that nothing was due on the same, for a long time prior to the institution of this suit; and that the real estate from which the taxes were cut was, at the time of the institution of this suit, and was at the time of making of the affidavit the property of the plaintiff. The court refused the petition, and denied the application for a new trial.

LATADY, for appellant.

MADE & VAUGHAN, *contra*.

ARALSON, J.—The 5th count in the complaint was withdrawn before the court passed on the demurrer. A new count, No. 6, was filed in substitution for No. 5, stricken out by amendment. The defendant, upon demurrer to the complaint, as thus amended, avers the specific ground, that counts 1, 2, 3 and 4 are in debt, and the 6, in assumpsit.

There is evidently a misjoinder of counts. The four first counts are causes of action for debt, proper in a case of that kind, and the 6th is in tort. It was not framed under section 3296 of the Code, as were the others. The error is, "that there is a misjoinder of counts." If it had stopped there, without stating in what the misjoinder consisted, it would have been general, and faulty under section 2690, which forbids any objection by way of demurrer to be taken or allowed, which is not distinctly stated. Here, however, the defendant proceeded to state distinctly, what the ground of its demurrer is, viz., that the four first counts were actions in debt, and the 6th in assumpsit. The defendant had the privilege of not demurring at all. It is one he may waive. If he demurs for a wrong reason, he waives all grounds, even if good; for, under our rulings, this court, under said section of the Code, is prohibited from con-

sidering any other objection than the one specified to which a plea or complaint may be subject; and, not being subject to the objection specifically stated, the demurrer must be overruled.—*Lakeside Land Co. v. Dromgoole*, 89 Ala. 507, 7 So. Rep. 444. In *Eads v. Murphy*, 52 Ala. 524, it is said: "When a demurrer is interposed, the court, can not consider any other objection than is specifically stated. However insufficient the pleadings may be, in other respects, if it is not obnoxious to the particular objections assigned, the demurrer must be overruled." The purpose of the rule is, to have defects pointed out, to give the party pleading an opportunity to cure them by amendment, if it can be done.—*Sledge v. Swift*, 53 Ala. 114. The demurrer to the complaint was properly overruled.

This action was brought under section 3296 of the Code, which has received construction at our hands. In *Rogers v. Brooks*, 99 Ala. 31, 11 So. Rep. 753, it was held that a complaint which avers that plaintiff is the owner of the land from which the trees were cut, stating their number and description, and that they were willfully and knowingly cut by defendant, without plaintiff's consent, contained all the facts required to be alleged by the statute, and will be treated as being an action in debt.

In *Allison v. Little*, 93 Ala. 152, 9 So. Rep. 388, it was held, that the right of action under said section of the Code is given, not to the person in possession, but to the owner of the land, whether he was in possession or not at the time of the commission of the trespass.

The demurrer to the complaint having been overruled, the defendant pleaded specially that one Coleman T. Lantrip was seized of the lands described in the complaint, and before the alleged trespass conveyed to R. H. Turner the coal, iron ore, and other minerals on the lands, with the right to enter on the lands and open drifts, slopes and shafts for the purpose of mining coal, iron ore and other minerals, and, also, all the timber and water on the same, necessary for the development, working and mining of coal, iron ore and other minerals, and the preparation and removal of the same for market, and the right to build roads over the same, necessary for the convenient transportation of all such mineral products to market, also, the right to build houses for all machinery; and that "said Turner by deed duly executed con-

[Turner Coal Co. v. Glover.]

ed the same to defendant. And said plaintiff, claim-said lands by color of a parol demise for ten years, he said Coleman T. Lantrip, made to him long before the conveyance aforesaid by Coleman T. Lantrip to R. H. Turner, entered on the lands above mentioned, was possessed of the same, and defendant, afterwards, entered upon plaintiff's possession, as lawfully it might, in manner complained of by said plaintiff and timber, as lawfully it might, and this is the injury complained of," and for which the plaintiff sues.

The plaintiff demurred to this plea on many grounds, of which,—the 6th and 7th,—are, that "it is not averred in said plea, that it was necessary to cut said timber for the development, working and mining of said land and iron and other minerals, and the preparation of the same for market and their removal," and, "because it is averred, that said timber was cut and used for the necessary purposes set forth in the foregoing ground of demurrer." The court sustained the demurrer on these grounds, and the defendant asked and was permitted to amend his plea, so as to meet these defects raised on demurrer.

The demurrer was properly sustained, for an averment of the right to cut the timbers for necessary purposes of development is not an averment that they were cut for such purposes. But, if there was error in the ruling, it was without injury, since the defendant insists in argument, that the plea, when properly and legally construed, contains all that the plaintiff by his demurrer insists it did not contain, and that, in substance and effect, it was the same before as after amendment.

The plaintiff replied to the plea as amended, "That at the time of the said Coleman T. Lantrip's pretended sale to R. H. Turner, and said Turner's pretended purchase of the same from him, (under and through whom the defendant claims its right to cut said trees and timber), that the said Coleman T. Lantrip did not have the title or right to said timber and trees, nor the right nor title to the surface of the land whereon said trees were located and from which they were cut, * * * but that the right and title to the same, were in plaintiff," etc. This replication was, perhaps, unnecessary, as the plaintiff might, possibly, have availed himself of the same facts, by joining issue on defendant's plea; but, be that as it may, the

replication was cautionary, and was, if true, a complete response to the plea. The plea sets up title to the surface of the land and shows, specifically, how defendant derives such title—through Turner, and he through Lantrip. The replication denies that Lantrip had such title in the land and trees as he claimed, which, at the time of the alleged sale, he could convey to defendant; and avers that plaintiff was the owner of the same, by conveyance from said Lantrip, previous to defendant's conveyance from him. The replication was not subject to the demurrer, as the same was interposed by defendant, and the court committed no error in overruling it.

The defendant declined to take issue on, or in any manner plead to said replication.

It is unnecessary to consider the other assignments of error. The plaintiff introduced evidence tending to prove that he was the owner of the lands from which the trees were cut, and the allegations, generally, of his complaints, and the facts set up in his said replication; but, much of the evidence, which; it is said, was offered and admitted, is not set out in the bill of exceptions, and it is not stated that the bill contains all the evidence that was introduced. We must presume that there was sufficient evidence introduced to sustain the judgment rendered by the court, and the judgment is affirmed.

The case between the same parties, No. 322,—submitted by agreement and tried with the foregoing case, No. 296,—is a petition for a re-hearing in the last named case, under section 2872 of the Code. The petition fails to show that the defendant was prevented from making his defense by surprise, accident, mistake or fraud without fault on his part.—*Ex parte Wallace*, 60 Ala. 267; *Waldrom v. Waldrom*, 76 Ala. 289; *Barron v. Robinson*, 98 Ala. 351.

Even if defendant had known about the fact, on account of which he applies for a rehearing, viz., that there was a mortgage on the land from which the trees were cut, given by the plaintiff and his wife to a third person, it would have been of no avail as a defense to him; for the mortgagor, whether before or after the default, is regarded as the owner of the property mortgaged against all persons, except the mortgagee.—*Allen v. Kellam*, 69 Ala. 443; *Comer v. Sheehan*, 74 Ala. 457; *Marks v. Robin-*

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son, 82 Ala. 69, 2 So. Rep. 292; *Cotton v. Carlisle*, 85 Ala. 177, 4 So. Rep. 670.

If more were needed, the affidavit of J. F. Glover shows that the mortgage was on record at the day of the trial, and had been for a long time; that the same has been paid and satisfied in full, and that the mortgagee has no claim on the land or interest in it.

There was no error in refusing the prayer of said petition. It was wholly insufficient for the relief it sought.

Affirmed.

Keyland v. Keyland.

Final Settlement of an Executorship.

1. *Written affidavit inadmissible without proof of its execution.*—An affidavit containing admissions made by a decedent is not admissible as evidence on the final settlement of his estate, without proof of its execution by the deceased; and the fact that the affidavit bears the certificate of a notary public of subscription and verification, is not efficacious to make the writing self-proving.

APPEAL from the Probate Court of Mobile.

Heard before the Hon. PRICE WILLIAMS, JR.

On June 1st, 1876, Wm. Keyland executed and delivered to his mother, Sarah McStraffick, the following note:

“\$1000.00.

MOBILE, ALA., June 1st, 1876.

On demand we promise to pay to the order of Sarah McStraffick one thousand dollars. Negotiable and payable at Mobile Savings Bank. Value received.

WM. KEYLAND & Co.”

On February 3, 1877, said Wm. Keyland also executed and delivered to his mother another note in words and figures as follows:

“MOBILE, ALA., Feb. 3d, 1877.

“One day after date we promise to pay to the order of Sarah McStraffick, two hundred and fifty dollars, at 8 per cent. per annum until paid. Value received. Negotiable and payable at Mobile Savings Bank.

WM. KEYLAND & Co.”

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Mrs. Sarah McStraffick, the mother of Wm. Keyland, died leaving her last will and testament, which was duly probated in the probate court of Mobile county on November 7, 1879. The second clause of her said will was as follows: "Second, I give and devise to my son, William Keyland, during his natural life the sum of twelve hundred and fifty (\$1250) dollars, for which I now hold his promissory notes for the above amount of money already paid him, and at his death to be paid to his three oldest children by his first wife, Mary Sarah Keyland, now deceased, namely, William Henry Keyland, Thaddeus Romer Keyland, and Clara Mary Keyland, equally share and share alike." .

On March 23, 1890, Wm. Keyland died leaving his last will and testament, which was duly probated in the probate court of Mobile county on May 1st, 1890. By his last will and testament Wm. Keyland bequeathed all of his property, after the payment of his debts, to his widow, Elizabeth Keyland, and his children, Reuben Keyland, Wm. H. Keyland, Thaddeus R. Keyland and Clara M. Bowen *nee* Keyland, share and share alike. Under this will Wm. H. Keyland and Thaddeus R. Keyland were appointed the executors. Wm. H. Keyland and Thaddeus R. Keyland, as executors under the will of Wm. Keyland, deceased, filed their account in the probate court of Mobile county for a final settlement of their executorship, on November 10, 1891. In this account they were credited with three credits of \$416.66 each, being the amount alleged to have been paid to Wm. H. Keyland and Thaddeus R. Keyland and Clara M. Bowen, respectively, in payment of the above two notes, amounting to \$1250, claimed by them as legatees under the will of Sarah McStraffick, deceased. Mrs. Elizabeth Keyland, the widow of Wm. H. Keyland, and Reuben Keyland, the minor child of Wm. Keyland, deceased, and said Elizabeth, filed their exceptions to the allowance of these three credits by the executors on the ground that they were barred by the statute of limitations. On the hearing of the contest, which arose by virtue of these exceptions, the executors introduced in evidence the two notes above copied, and also introduced in evidence the following affidavit: "I, William Keyland, do now state that the note for \$1,000, dated June 1st, 1876, payable on demand to Sarah McStraffick at Mobile Savings Bank

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and signed Wm. Keyland & Co., and also the note for \$250, dated February 3d, 1877, payable one day after date, to Sarah McStraffick, payable at Mobile Savings Bank and signed Wm. Keyland & Co., are the notes referred to by my mother, Sarah McStraffick, in the second clause of her will, and which money she loaned and advanced to me in her life time. The notes are in fact my individual notes though signed Wm. Keyland & Co. I had in fact no partner and I only am liable upon said notes.

WM. KEYLAND.

Subscribed and sworn to before me this 9th day of May A. D. 1881.

W. E. RICHARDSON,
Notary Public M. C."

Elizabeth Keyland and Reuben Keyland objected to the introduction of said affidavit on the grounds that it was not self-proving, and also that it was no deposition or affidavit taken in this cause, and that it was irrelevant and illegal. The court overruled said objection, and allowed the said affidavit to be introduced in evidence without any further proof in regard to its execution. To this ruling of the court Elizabeth Keyland and Reuben Keyland duly excepted

The will of Mrs. Sarah McStraffick was introduced in evidence together with an order of the probate court admitting it to probate; and it was also admitted by all of the parties that Wm. H. Keyland, Thaddeus R. Keyland, Clara M. Bowen, Elizabeth Keyland and Reuben Keyland were devisees under the will of Wm. Keyland, deceased, and that each of them had a one-fifth interest in his said estate. This being all of the evidence, the court overruled the objections and exceptions of the said Elizabeth Keyland and Reuben Keyland to the payment of said notes referred to, and decreed that said notes, and each of them, were valid claims against the estate of Wm. Keyland, deceased, and were proper credits on the executors' accounts. Elizabeth Keyland and Reuben Keyland separately and severally excepted to each of these rulings of the court; and on this appeal, prosecuted by them, assign as error these several rulings.

OVERALL, BESTOR & GRAY, for appellants.

No counsel marked for appellee.

McCLELLAN, J.—The probate court, in our opinion, erred in admitting in evidence the paper purporting to

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be the affidavit of William Keyland, deceased, without proof that he made the same. The facts set forth in the paper were, of course, competent for the purpose of showing that William Keyland accepted the legacy under the will of Mrs. Sarah McStraffick on the terms therein specified, that is, that he accepted the bequest of the money he owed the testatrix for life, and thereby charged his estate with the payment of the amount thereof to the children of his marriage with his first wife; and the contents of the affidavit for this purpose stand upon the footing of admissions made by him. But it was necessary to prove in some way that he made these admissions. The paper without the jurat of the notary public would be as efficacious as it is with it. The facts that it is in form an affidavit purporting to be signed by him and to bear the certificate of a notary of subscription and verification, do not, in other words, change its character as a mere written admission, nor add to its dignity or inherent probative force. The paper is not the foundation of a suit, and hence not within the influence of section 2770 of the Code. As admissions of Keyland, its statements must be proved to have been made by him before they are admissible in evidence. Being written, it was necessary to prove that he signed the writing as a predicate for its admission for any purpose. The court should have excluded it, there being no evidence that he signed the paper or admitted the facts it contains. With it out of the case, the judgment of the probate court can not be sustained. There was no testimony in the case, except this which was improperly in it, going to show that William Keyland accepted the legacy under Mrs. McStraffick's will, and hence no evidence that the debt evidenced by the notes ceased to be a debt simply against which statutes of limitations have operated a bar, and that the amount thereof became a trust fund in the hands of Keyland during his life, with remainder over on his death to certain of his children, thus constituting a charge on his estate in their favor.

The judgment of the probate court must, therefore, be reversed, and the cause will be remanded.

Reversed and remanded.

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Bibb v. Montgomery Iron Works.

Bill in Equity to cancel Bonds of the Corporation.

Bill in equity to cancel bonds of a corporation; when properly dismissed.—A bill in equity, filed by a *bona fide* holder of bonds of a corporation, seeking the cancellation of certain other bonds of the same corporation in the hands of stockholders of the company, on the ground that they were issued to said stockholders without the payment by them of any consideration, and are not proper charges upon the property, which does not aver that the said company has made default in the payment of interest due on its bonds, including those issued by the defendant, that it has in no way misused or impaired the property mortgaged as security for the said bonds, and which does not aver that the complainant has any lien upon, claim to or control over the earnings of the said company, or upon the money received by it as a loan, is without equity and is properly dismissed.

APPEAL from Chancery Court of Montgomery.
Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on February 10, 1892, by Josephine M. Bibb, against the Montgomery Iron Works and others; and sought to have certain bonds of the defendant corporation held by some of the stockholders cancelled, and to have the holders of said bonds account to the corporation for the interest received by them on said bonds. The averments of the bill are sufficiently stated in the opinion.

The defendants interposed several demurrers to the bill, and also moved to dismiss the bill for the want of equity. On the submission of the cause upon the demurrers and motion to dismiss, the chancellor overruled the demurrers, but sustained the motion to dismiss the bill.

The present appeal is prosecuted by the complainant, who assigns as error this decree of the chancellor.

ROQUEMORE, WHITE & DENT and E. P. MORRISSETT, appellants.—A creditor of a corporation has a standing in a court of equity, without a request upon, and a refusal by, the corporation to sue, to prevent the misappropriation of corporate funds if his debt will be there-

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by endangered.—Wood's Field on the Law of Corporations, § 365, and authorities cited in note 1.

TOMPKINS & TROY, *contra*.—(1.) No state of facts is alleged which show any legal excuse for not calling on the corporation to bring the suit, and the rule in such cases applies as well to suits brought by creditors as stockholders of corporations.—*Newby v. Oregon Cen. R. R. Co.*, 1 Saw. 63; *Penn. Bank v. Hopkins*, 16 Amer. & Eng. Corp. Cases 71. (2.) If the corporation had refused to bring the suit, appellant could not have instituted the same until the trustee had been asked to do so and had refused. Jones on Cor. Bonds & Mortg., § § 289, 294-5. (3.) Even if the complainant had brought herself within the above rule the facts alleged in the bill would not entitle her to any relief.—Jones on Cor. Bonds & Mortg., § 196; *In re Cape Briton Co., L. R.*, 26 Ch. Div. 221; *Morrison v. Globe Panorama Co.*, 28 Fed. Rep. 817; *Foster v. Seymour*, 23 Fed. Rep. 65.

COLEMAN, J.—The bill avers that Joseph W. Dimmick, W. L. Chambers, Geo. W. Craik, P. B. Bibb, A. M. Baldwin and B. McAdam were the promoters, organizers and corporators of the Montgomery Iron Works; that it was incorporated with its capital stock fixed at \$50,000, which was subscribed and paid for by them, by "turning over and delivering to the corporation a certain lot of land, houses and manufacturing material jointly owned by them for which they paid \$25,000, in the following proportion and amounts: P. B. Bibb, \$7,500, Dimmick, Baldwin and Chambers, each, \$5,000, and Craik, \$2,500, and that \$25,000 was its full value." This statement fails to account for the interest of McAdam. The omission may not be material for a determination of the questions raised in the record. The bill avers that stock was issued to the subscribers in double the amount of the respective sums paid by them, and that the amount actually paid in is of no greater value than the original cost of the purchasae, to-wit: \$25,000. The bill further charges that the corporation issued its bonds to the amount of fifty thousand dollars, which were secured by a mortgage upon its property. The bonds bore interest at 8 per cent., the interest payable annually, and upon default of payment of interest the mortgage might be

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closed. The bonds do not mature for several years in the future. Of the \$50,000 of the issue of bonds, \$10,000 were placed in the treasury for the use of the company, and which have been used, sold, hypothecated or pledged as collateral security to the First National Bank of Montgomery. Of the remaining bonds, not thus disposed of, the complainant claims to be a *bona fide* holder and owner of \$17,500 for value, and without notice of any defect or irregularity in their issue, that the said Dimmick received \$10,000, Baldwin, \$5,000 and Craik, \$2,500, without paying any consideration therefor, but received them solely in consideration of being stockholders, and are not to account for them in any way. The bill further charges that the assets of the company are not equal in value to its liabilities, that the business is not successfully conducted, and that to meet its liabilities, it is compelled to borrow money to increase its indebtedness; that either from its earnings or from money borrowed, the annual interest accruing on its bonded indebtedness, including those held by the said Dimmick, Baldwin and Craik, is paid. The conclusion of the pleader is, that the bonds held by the stockholders, for which they paid nothing, are illegal, and in law are not proper charges upon the property of the company. The prayer of the bill is, that these bonds be cancelled, and that the holders be required to account to the corporation for the interest received by them on these bonds.

To properly understand the case made by the bill, it is necessary to note some omissions of averments which seem to us to be material for a proper consideration of the case intended to be raised by the bill. It is not stated, that the company has made default in the payment of the interest due on its bonds, including those held by the complainant. It is not stated that the corporation company has, in any manner, impairing the property mortgaged as a security for the payment of the bonds. It is not pretended that the complainant has any lien upon or claim to, or control over the earnings of the company, or its management, or the money received by it as a loan. What claim has the complainant, whose bonds are not yet due, and to whom there has been no default in the payment of interest, to the money earned by the corporation; or what right to enjoin the debtor from contracting other debts, or applying its own money to the discharge of other obligations, contracted in the regular course of its business?

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It is not pretended that the corporation company has in any manner misused or impaired the property which is mortgaged to secure complainant's debt.

Some questions are presented and argued, upon which all the members of the court are not agreed, but their decision is not necessary for a determination of the case. The court is unanimous in the opinion that the bill is without equity, and that the decree of the chancellor, dismissing the bill, is free from error.

Affirmed.

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*Bill in Equity to enforce Lien upon Stock, and to compel its
Transfer on the Books of the Corporation.*

1. *Lien of corporation on stock.*—Section 1674 of the Code of 1886, which provides that "all private corporations have a lien on the shares of its stockholders, for any debt or liability incurred to it by a stockholder, before notice of the transfer, or of a levy of such shares," confers the lien therein provided to secure debts which had been contracted before its enactment, as well as those contracted afterwards.

APPEAL from the City Court of Birmingham, in Equity.
Heard before the Hon. H. A. SHARPE.

The facts of the case are sufficiently stated in the opinion.

E. J. SMYER, for appellant.—(1.) The general rule of law is that, in regard to civil remedies, laws may be enacted which have a retroactive operation, but they are not to be construed to have that effect, unless it was manifestly the purpose of the legislature that they should. *Smith v. Kolb*, 58 Ala. 645; *Barnes v. Mayor and Aldermen of Mobile*, 19 Ala. 707; *Kidd v. Montague*, 19 Ala. 624; *Ex parte Buckley*, 53 Ala. 54; *Cooley's Constitutional Lim.*, 460. (2.) The lien conferred by section 1674 of the Code is a contract lien—is a contract right—and the statute can not attach to the contract of the parties pre-

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viously made. It can not confer this right where there was no such right when a contract was made; for it can not alter the terms of existing contracts.—*Howard v. Bugbee*, 24 How. (U. S.) 461; 16 L. Co-op. Pub. Co. Ed., 753, reversing *Bugbee v. Howard*, 32 Ala. 713; *Bronson v. Kinzie*, 1 How. 311; *Wilson v. Brown*, 58 Ala. 62; *McDonald v. Berry*, 90 Ala. 464, 7 So. Rep. 838; *Hastings v. Lane*, 15 Me. 134; *Coffin v. Rich*, 45 Me. 507; *Robinson v. Magee*, 2 Cal. 81; *Robinson v. Howe*, 13 Wis. 341.

HEWITT, WALKER & PORTER, *contra*.—The question presented is not whether section 1674 of the Code has a retroactive operation, but whether it operates on existing causes of action, before or after its approval. The right provided by this section does not impair the obligation of contracts; but it is a remedy for the enforcement of a right, and, therefore, operates on existing causes of action, there being nothing in the language of the section itself to prevent such an operation.—*Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120; Endlich on Interpretation of Statutes, §§ 286; 287.

HARALSON, J.—One of the original stockholders of appellee, transferred his stock to appellant, as collateral security for a debt owing to it, after the Code of 1886, —where § 1674 first appears—went into operation. The stockholder, at that time, owed the corporation whose stock he held, an indebtedness which was contracted, prior to the adoption of the Code, and the enactment of said section 1674. The appellant gave notice to appellee of this transaction and demanded a transfer of said stock, on its books, to appellant, which appellee refused to make, claiming that it had a prior and superior lien on the stock, to that claimed by appellant, which lien of appellee was conferred by said section 1674 of the Code.

The bill is filed to have appellant's lien on said stock declared superior to appellee's lien on it, and to compel the transfer to appellant, on the books of appellee, of said shares of stock. A demurrer to the bill having been sustained and the bill dismissed, this appeal is to reverse that decree.

The question for our determination is, whether the lien created by section 1674 of the Code in favor of a corporation, against its stockholders, "for any debt or lia-

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bility incurred to it, by a stockholder, before notice of transfer, or of a levy on such shares," must be confined to debts of the stockholder to the corporation created after the enactment of that section, or if it does not apply as well, to debts contracted before its enactment.

I. We said in the *Mobile Mutual Ins. Co. v. Cullom*, 49 Ala. 561, that "the common law regards the shares composing the capital stock of an incorporate company, as personal property, capable of alienation or succession, in any of the modes by which that species of property may be transferred. Thus regarding such shares, a lien or equity, in favor of the corporation, to charge them with a debt due from the shareholder, could not be implied."

It is not to be doubted, that a lien of the kind may be created by law. As Mr. Cook expresses it: "Such a lien as this, in favor of the corporation, may be created by statute, by charter, and the weight of authority holds, that it may be created by by-law.—Cook's Stock & Stockholders & Corp. Laws, § 522; 1 Jones on Liens, § 377; *Cunningham v. The A. L. Ins. & Trust Co.*, 4 Ala. 652.

II. The statute, section 1674 of the Code, under which the lien of the appellee is claimed, reads, "All private corporations have a lien on the shares of its stockholders, for any debt or liability incurred to it by a stockholder, before notice of a transfer, or of a levy on such stock." This is, in substance, the language by which liens on stock are generally conferred by statute, whether in the original acts of incorporation, or by separate special act, afterwards, or by by-laws of the corporation, authorized by statute.

It is a general rule, says Cook. "That a lien upon stock is a lien for all debts of the shareholder due to the corporation, and it is not necessary that the debt be due and payable at the time when the lien is sought to be enforced. It covers debts which are not due, as well as those that are due, and all indebtedness to the corporation, whether payable presently or at a future time." Cook on Stock, Stockholders & Corp. Laws, § 527, and authorities there cited. "The word, 'Indebted,' in statutory provisions for liens in favor of corporations, applies as well to debts to become due, as to those actually due and payable."—1 Jones on Liens, § 393.

In construing the words, "Any debt or liability," in a statute giving a lien on stock, we held, in the *Mobile*
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ual Ins. Co. v. Cullom, 49 Ala. 562, that "the object in creating the lien is the security of the corporation. That security is extended to 'any debt or liability' of the stockholder, not distinguishing between the character or consideration of the debts. We can perceive no good reason for such a distinction; but, on the contrary, we perceive a good reason for embracing any debt properly contracted with the corporation."—1 Jones on Liens, §§ 395; *The St. Louis P. Ins. Co. v. Goodfellow*, 9 Mo.

II. Mr Cooley, in his work on Constitutional Limitations, referring to retrospective statutes, says: "It is a sound rule of construction, that a statute should have prospective operation, unless its terms show clearly a relative intention that it should operate retrospectively."—Cooley Const. Lim., § 370. This rule has received the sanction of our own adjudications.—*Ex parte Buckley*, 53 Ala. 54; *Smith v. Kolb*, 58 Ala. 646; *Warten v. Thews*, 80 Ala. 429.

But this strictness of construction is not to be applied to all retroactive statutes. In commenting on this language, taken from Cooley, this court used this language: "The statutes excluded from judicial favor, and subjected to this strictness of judicial construction,—statutes which may properly be denominated retrospective,—are those which impair vested rights, acquired under existing laws, or create a new obligation, impose a new duty, or create a new disability, in respect to transactions or contracts, already past. Such statutes are offensive to the principles of sound and just legislation, and it is of course, the authorities to which we have been referred use the term 'odious,' and other epithets, expressive of judicial opprobrium. There are other statutes which when operating retrospectively, have not incurred judicial condemnation, and to which a liberal construction, for the summation of the just and beneficial purposes in view, has been fully accorded. Such statutes are intended to remedy a mischief, promote public justice, correct innocent mistakes into which parties may have fallen, remove irregularities, or give effect to the acts and contracts of individuals fairly done and made. These are remedial statutes, conducive alike to individuals and public good."—*Ex parte Buckley*, 53 Ala. 54-5. The question is, at last, "Do they establish substantial justice

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and subvert injustice?"—Enlich on Int. of St., §§ 273, 277, 278.

In *Hoffman v Hoffman*, 26 Ala. 545, it was said: "Whenever a statute is levelled against an abuse, or in furtherance of an acknowledged principle of right and justice, every reason exists for its most reasonable application; and, in such cases, it may fairly be presumed, that it was the intention of the legislature, that the boon of the statute should be extended to every case which its words could properly include."

It is a sound policy of law, to give a liberal and generous construction to this statute, to the end that a corporation may enjoy that just and equitable right of set-off accorded to natural persons, of not being required to pay its creditor, the stockholder, before he accounts for his debts to the corporation.

The supreme court of Mississippi, in construing an amendment to section 1255 of their Code, which gave a lien which did not exist before, held that said act, which gives a plaintiff, suing at law for the purchase money of personal property sold by him to the defendant, a lien on such property while in the latter's hands, and provides for a writ of seizure upon the filing of the declaration, in addition to a personal judgment against the defendant, is in its character remedial, and hence may be applied in cases where the causes of action existed, at the time of its passage.—*Excelsior Man. Co v. Keyser*, 62 Miss. 155. In still another case in that court, in which the question was presented, whether an attachment law which went into effect, after the alleged fraudulent act complained of was committed, had a retroactive effect, it was held, "That the language (of the statute) is general and unrestricted, and it must be presumed the legislature intended to extend it to all cases, whether then existing or to arise thereafter, embraced within the terms presented.—*Green v Anderson*, 39 Miss. 363.

IV. The foregoing authorities justify us in holding, that this statute, section 1674 of Code, was designed by the legislature, to confer the lien therein provided, to secure debts which had been contracted before its enactment, as well as those contracted afterwards.

Jones, in his work on Liens, lays down the doctrine, that such a lien may be conferred by statute, as was done here, upon a corporation already organized, as

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here, in respect of shares already issued for debts already incurred, as is the case here; that in such case, "the lien is created by the statute, immediately upon its going into effect, so that an indebtedness as to the corporation from a shareholder existing at the time, will be secured in preference to a pledgee to whom the shareholder has delivered the certificate with a power of attorney for its transfer, provided the corporation has received no notice of such pledge of the certificate."—1 Jones on Liens, § 382.

And Cook on Stocks and Stockholders, section and page 531, holds, that when a lien is given to the corporation by the charter or the articles of association, or by statute, there is constructive notice to all persons dealing with the corporation, that they must, at their peril, without reference to what the certificate recites, inform themselves as to any debts to the corporation that may affect the shares they propose to buy. If there is a lien, they are held to have known it, whether the certificate declares it or not. To the same effect is section 379 in 1 Jones on Liens.—*The First National Bank of Hartford v The Hartford L. & A Ins Co*, 45 Conn. 35.

Our conclusion is, the court below committed no error in sustaining the demurrer to the bill, and its decree is affirmed.

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Action by Administrator of Deceased Employé for Negligence Causing Intestate's Death.

1. *Negligence in not providing and maintaining safe place for employé to work.*—An employer must provide and maintain a safe place for its employés to work while engaged in the discharge of their duties; but where a repairer and an engineer in charge of the engine to be repaired have performed the duties imposed upon them, respectively, by providing a place of safety for repairing the engine, and the employer has met the requirement imposed upon it to maintain the safety of the place while the work of repairing was being done, by employing a competent engineer who was present to preserve the safe condition of

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the place, the employer has performed its full duty to provide and maintain a place of safety for the repairer to do his work, and it can not be held responsible by the repairer under section 2589 of the Code for any failure on the part of the engineer to keep the place in a safe condition; such failure being the negligence, not of the employer, but of a fellow servant of the repairer.

2. *Action for death of employé; when not maintainable under sub-section 4 of section 2590 of the Code.*—When it is shown that an employé did not come to his death as a proximate result of having, in the discharge of his duties, gone into the place where he was killed, but by the supervening negligence of another or through an unaccountable accident, the personal representative of such employé cannot recover damages from the employer under sub-section 4 of section 2590 of the Code, on the ground that his intestate suffered death in consequence of his going to and being in the place where he was killed by the direction of one in the employment of defendant, whose orders he was bound to obey.

3. *Same.*—If obedience by plaintiff's intestate to the orders of his superior is shown to bear the relation of proximate cause to his death, in order to hold the employer responsible under sub-section 4 of section 2590 of the Code, it must be further shown by the evidence that the superior was negligent in giving the order.

4. *Engineer not a superintendent.*—An engineer, actually operating an engine with his own hands and with the aid of a helper as directed by persons superior to him in their common employment, is not a person "who has any superintendence entrusted to him," so as to make the employer responsible to a person for the negligence of the engineer under sub-section 2 of section 2590 of the Code.

APPEAL from the City Court of Birmingham.

Tried before the HON. W. W. WILKERSON.

This action was brought by S. D. Dantzler, administrator of W. A. McKay, deceased, against the DeBardeleben Coal & Iron Company, to recover damages for alleged negligence which caused the death of plaintiff's intestate. The facts of the case are sufficiently stated in the opinion. The court gave the general affirmative charge for the defendant, to the giving of which the plaintiff duly excepted. There was judgment for the defendant. Plaintiff appeals, and assigns as error the giving of the general affirmative charge at the request of the defendant.

BOWMAN & HARSH and BRICKELL, SEMPLE & GUNTER,
for appellant.

WALKER PERCY, *contra*.

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MCCLELLAN, J.—This action is prosecuted by the personal representative of W. A. McKay, deceased, and sounds in damages for the death of plaintiff's intestate, which, it is insisted, resulted from the negligence of the De Bardeleben Coal & Iron Company. The first count of the complaint avers wrong and negligence on the part of the company itself, under section 2589 of the Code. The other counts are drawn under section 2590 of the Code, and severally present causes of action under subsections 1-4 of that section.

The theory of plaintiff under the first count is, that the defendant company was negligent in not providing and maintaining a safe place for McKay, one of its employes, and engaged in the discharge of his duties as such when he was killed, to work in. The evidence is without conflict to the effect that McKay was killed by the movement of the piston of a blowing engine. This engine was one of five located in the same room, and all in charge of an engineer named Gould. It became necessary to repair this engine, and to that end it was stopped. It is also shown that when such engine needed repairs, it was Gould's duty to effectually disconnect it from the steam supply, and then turn it over to the repairer, after which, and while the repairs were in progress, the engineer's further duty was to keep watch upon it, and prevent any interference with it by third parties, but beyond this he had no further concern with it until the repairs were completed, and the engine turned over to him by the repairers. When the engine had been stopped, disconnected from the steam supply, and turned over to the repairers, it was their duty to further secure its inaction either by inserting timbers in the spokes of the fly wheel, which would, to the extent of the strength of the timbers, prevent its revolution, and consequently all movement of the engine, or by propping the piston rod with a heavy timber, which would prevent its descending, (its movement is vertical,) and, of consequence, all movement of the machine. These methods are about equally efficacious, and are each intended to guard against any accident by which a connection might be re-established between the boiler and the steam cylinder. In this instance the evidence is without conflict that Gould did all that was required of him in disconnecting the engine from the boiler, and that McKay, before

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attempting the repairs he was to make, propped the piston rod in the manner indicated. Notwithstanding all this, however, motion was in some way imparted to the engine, the piston rod descending, crushing the beam of wood intended to support it, and crushed and killed McKay, who was inside of the air cylinder, or blowing tub above the steam cylinder, by drawing after it the iron head of the rod which fills the cylinder or tub. Confessedly this movement could have been imparted to the engine in only one way; that is, by reconnecting the engine with the boilers, and turning on the steam. This was done, the inferences are, either by the engineer, or through the interference of some third person. But for this being done, McKay's place of work was a perfectly safe one, and had been made so by the performance by Gould and McKay on their respective parts of the duties which their employment imposed upon them. The company, in other words, had required these employes to provide a safe place for one of them to work. They had complied with the requirement, and the place of safety had been provided. Certainly to this point, no corporate negligence appears. That the company had discharged its full duty in this regard is demonstrated by the result reached in the actual existence of the conditions it was under an obligation to create. It was under a further duty to maintain the safety of the place while the work was being done. It, however, was not required to insure absolute safety. Its whole measure of duty was to use all reasonable means to that end which a careful and prudent man would resort to under like circumstances. It was not to be expected that the corporation, even were it capable of direct action, would be present in person, so to speak, for the purpose of looking to the maintenance of the safe conditions it had provided. All that was incumbent upon it was to have a proper agent or servant present for this purpose. It could do no more than this, and this it did in the person of Gould, who was charged with the duty of seeing that the safe conditions in respect of the engine be not interfered with by third persons. Gould being a competent person for this service, the company's full duty was performed in having him there to perform it; and any remission of performance on his part was the negligence, not of the employer, but of a fellow servant of McKay.

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for which the defendant is not responsible at common law in connection with section 2589 of the Code, and not liable at all, unless, under other counts of the complaint, the evidence brings the case within section 2590 of the Code,—the Employer's Liability Act. The trial court did not err, therefore, in giving the affirmative charge for the defendant, so far as the first count of the complaint is concerned.

It remains to be considered whether the case is brought by the evidence within, or rather whether there is any evidence tending to make a case under, section 2590 of the Code. It is manifest that plaintiff's intestate did not come to his death as a proximate result of having gone into and being in the blowing cylinder or tub. His position, but for supervening negligence or unaccountable accident, was a safe one; and hence there is no merit in the contention that he suffered death in consequence of going or being there by the direction of Boyd, to whose orders he was bound to conform, under subsection 4 of the statute; and, moreover, had such conformance to Boyd's orders borne the relation of proximate cause to the casualty, there is no evidence whatever that Boyd was negligent in giving the order. These considerations show also the grounds of our conclusion that the case is not brought under subsection 4 of the act; and it is not insisted that the injury resulted proximately from any defect in the ways, works, machinery, or plant of the defendant, within the intent and meaning of subsection 1.

The chief contention of appellant is that the evidence tended to prove a case under subsection 2 of section 2590 of the Code, and that, therefore, the court erred in charging affirmatively for the defendant; and our further discussion of the case will be confined to the inquiry whether there is any evidence going to show that McKay's death was caused by reason of the negligence of any person in the service or employment of the master or employer, who had any superintendence intrusted to him, while in the exercise of such superintendence. It is conceded in the outset, for the argument, that the evidence did tend to show that Gould, the engineer, was negligent, either in himself setting the engine in motion, or in failing to prevent some third person setting the engine in motion. There can be no doubt that Gould

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and McKay were fellow servants of the defendant, or that the common master was not liable to the one for injuries resulting from the negligence of the other, unless that other was negligent while in the exercise of superintendence intrusted to him by the employer. Was any superintendence intrusted to him? We are aware that the eighth section of the English employer's liability act, which contains a definition of the phrase, "person who has superintendence intrusted to him," is not embodied in our statute, which is taken from, or in most respects modelled after, the English statute; and we need not take issue with counsel that this is a pregnant omission, implying an intent on the part of the legislature to make the common master liable whenever the injury complained of by one servant is caused by any person in the service who has any superintendence intrusted to him, whether superintendence be his sole or principal duty or not, and whether or not he is ordinarily engaged in manual labor, provided only that the damnifying negligence occurs while such person is in the exercise of whatever superintendence is in fact intrusted to him. Yet neither the incorporation of that part of section 8 to which we have referred into the English statute nor its omission from our own, neither its import in the one nor the implication involved in its omission from the other, did or can exert any influence upon the meaning of the word "superintendence." That word has the same significance in both statutes as had the definition of the expression, "person who has superintendence intrusted to him," never been incorporated in the one or omitted from the other. The definition is not of the word "superintendence" at all, but only of the amount or degree of superintendence which must be intrusted to a person to fill the terms of subsection 2; the abstract quality of superintendence being the same whether it is intrusted to a person in sufficient degree to come within the statute or not. So that we must look elsewhere than to the English statute, or to the fact that the English definition of the phrase, "person who has," etc., has been omitted from our statute for a definition of "superintendence." We find this in Webster's Dictionary: "Superintend: To have or exercise the charge and oversight of; to oversee with the power of direction; to take care of with authority,—as, an officer superintends the

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building of a ship or the construction of a fort; 'God exercises a superintending care over all his creatures.'"
"Superintendence: * * * The act of superintending; care and oversight for the purpose of direction, and with authority to direct. Synonyms: Inspection; oversight; care; direction; control; guidance." And this in Worcester's Dictionary: "Superintend, (L. superintendo; super, over, and intendo, to direct one's attention to; in, to, towards, and tendo, to stretch): To oversee; to overlook; to have the care and direction of." "Superintendence: * * * The act of superintending; oversight; superior care; direction; inspection." The following from the Century Dictionary: "Superintend: To have charge and direction of, as of a school; direct the course and oversee the details of, (some work, as the construction of a building or movement, as of an army;) regulate with authority; manage." And Roberts & Wallace, in their work on Duty and Liability of Employers, say: "The word 'superintendence' seems properly to imply the exercise of some authority or control over the person or thing subjected to oversight. * * * Accordingly it may, it is thought, be safely assumed that the person for whose negligence an employer is liable under this subsection (2) must be one to whom he has delegated some of that authority or power of control which he would otherwise himself have exercised." Pages 260, 261. To leave out of view for the moment the fact that Gould, the engineer, had a helper or assistant in the manipulation of these engines, we have simply the case of a man engaged in the manual operation of the machines. With his own hands he started the engines, regulated their revolutions, and stopped them; and all this, even to the number of revolutions per minute, he did at the direction and under the control of persons superior to him in the common employment. His was not the duty of giving, but of obeying, directions. He did not draw the attention of others to a thing to be done by them, but himself was required to do whatever was to be done. His care of the engines was not for the purpose of direction, and with authority to direct, but was a care to be effectuated by his own hands. He was not to guide and control others in their operation of the engines, but to control and regulate the engines by the laying on of his own hands. He was not to direct the

course and oversee the details of the operation of the machines, but the course was marked out by superior authority, and the details were executed by his personal physical exertion. He had none of that authority or power of control which the employer would otherwise himself have exercised, but all authority in the premises properly belonging to the master was exercised upon him in directing his services as a manual laborer. To say that a man oversees, overlooks, directs, guides, controls, inspects, has a care of, superintends an act which he himself wholly performs, is a contortion of language not to be tolerated. These terms, indeed, are always resorted to, to indicate that the thing done was not manually done by the person spoken of, but at his bidding. Each of these synonyms, and the word "superintendence" itself, must be taken in this ordinary and usual significance here. "Superintendence," in the statute, whatever else it may mean, has no application at all to a person whose sole duty is to be performed by personal acts of manual labor, or any direct bringing to bear of the physical energies to the end in view. It has been said, and is doubtless true in a sense, that the superintendence contemplated by the statute "may be either over men or machinery, plant," etc., but, whether over the one or the other, it must still be superintendence, power of direction, superior care, and control, with authority, as distinguished from direct personal manipulation. And while there may possibly be superintendence of the operation of a machine or a number of machines by one person without intermediate human agency, such a case is most difficult of conception. We are inclined to believe that its possibility even does not exist, and to think that what is really intended by the declaration that there may be superintendence of machinery is, that where one has authority to have machinery operated, to direct its operation, to overlook it, etc., and the means at hand in others to carry out his directions, he is superintendent both of the machine to be operated and of the men who are to manipulate it as he directs. This state of facts was brought forward in the argument upon which the declaration referred to was based, (Rob. & W. Employ. Liab. p., 262,) and we know of no case to the contrary. The case of *Railroad Co. v. Burton*, 97 Ala. 240, 12 So. Rep. 88, virtually adopts this view, and

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the case of *Pipe Works v. Dickey*, 93 Ala. 418, 9 So. Rep. 720, is in no sense opposed to it, since this question was not decided, or at all discussed, in that case; but, to the contrary, the existence of superintendence in Calahan, who really only had manual charge of a machine, was only assumed for the purpose of placing the defense on the ground of contributory negligence, of which there was no serious doubt on the evidence. Whether, however, there may possibly be a case of superintendency purely of machinery or not, it is most clear to us that Gould's position involved no such case, dissociated from consideration of the fact that he had a helper, whose duties are shown in the evidence. Whether he had any superintendence intrusted to him, in view of this consideration, is a question not necessary to be decided in this case. If any such superintendency existed in that connection it was not a general superintendency over the helper and the machines, not a general power of having the machines operated as he directed by the hand of the helper, but only a special superintendence to direct the helper to assist him, Gould, in the manual labor of operating them. It being his duty to personally perform—not merely direct—this labor, and his right only to have the other man help him to perform it, his relation to the machinery being primarily that of a laborer, it can not be said that he was in the exercise of any superintendence while he was discharging this primal duty of a manual laborer. His superintendence, if any he had, extended only to his actual direction of the helper, and ceased whenever he did any act in person and in the line of his duty as the engineer in charge of these machines; the case in this respect being radically different from those of *Osborne v. Jackson*, 11 Q. B. Div. 619, and *Railroad Co. v. Burton*, 97 Ala. 240, 12 So. Rep. 88, 94, in which the sole duty of the negligent person was that of superintendence, and he voluntarily co-operated in manual labor. The idea that it was not the legislative purpose to make the employer liable for the negligence of persons in charge of machinery, plant, and the like for the purpose of operating the same, unless the machinery is on or connected with railroads, is strengthened by a reference to sub-section 5 of the act, which allows a recovery when the injury is caused by the negligence of any person, etc., who has charge

or control of any signal points, locomotive engine, switch, car, or train upon a railway, or of any part of the track of a railway. If the contention of counsel be sound, that there may be superintendence of machinery, plant, etc., purely, there was no necessity for the enactment of this clause, since the matters provided for in it are embraced in clause 2. The legislature supposed they were not, and therefore enacted subsection 5.

The evidence in this case is without conflict to the effect that when the engine moved or was set in motion Gould's helper was not even on the premises, and that, if the engine was started by Gould, it was the direct, negligent act of a manual laborer, not in any sense done in the exercise of superintendence, conceding that at any time superintendence was intrusted to him. This leaves the case outside of subsection 2 of section 2590. The death of McKay, on this hypothesis, was not caused by the negligence of a person to whom superintendence was intrusted "while in the exercise of such superintendence." On the other hand, had the jury concluded that Gould did not start the engine, but that it was set in motion by some third person in consequence of his failure to prevent outside interference, the result must have been the same. On this hypothesis Gould was a mere watchman, for whose negligence the company was not responsible to his fellow servant, McKay. Rob. & W. Employ. Liab., 260. In no possible aspect of the evidence was the plaintiff entitled to recover. The affirmative charge for defendant was properly given.

Affirmed.

Haynes et al. v. McRae.

Action for Trespass Against a Sheriff and his Sureties for Levy of Attachment.

1. *Failure to introduce witnesses; when no suspicious circumstance.*—In an action of trespass brought by a purchaser from the defendants in attachment against the sheriff and his sureties, for the wrongful levy of such attachment, when the plaintiff himself has testified as to the

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purchase of the goods from the attachment debtors, to the circumstances of the transaction, and to the consideration paid, his failure to introduce the debtors as witnesses, they being present in court, is not a suspicious circumstance against the validity of the transaction; and a charge of the court that such failure does not authorize any presumption against the plaintiff is properly given.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. JOHN MOORE.

This was an action of trespass brought by the appellee, T. D. McRae, against W. E. Haynes, sheriff of Lowndes county, and the sureties on his official bond; and sought to recover damages for the alleged wrongful seizure of a stock of goods by the sheriff under a writ of attachment. There was judgment for the plaintiff, and defendants appeal.

There was only one assignment of error, and the facts having reference thereto are sufficiently stated in the opinion.

ROQUEMORE, WHITE & DENT and THOMAS H. WATTS, for appellants.

TOMPKINS & TROY, *contra*, cited *Pollak v. Harmon*, 94 Ala. 420, 11 So. Rep. 156; 3 Brick. Dig. 113, § 110.

COLEMAN, J.—Pollock & Co. sued out an attachment against McRae Bros. which was levied by Haynes (the sheriff) upon a stock of goods claimed by F. D. McRae. The present action was brought by F. D. McRae against the sheriff and others to recover damages for an unlawful seizure of the goods. On the trial, the plaintiff, F. D. McRae, testified as to the purchase of the goods from McRae Bros., the circumstances of the transaction, and the consideration paid by him for the goods. The two members of the firm of McRae Bros. were present in court as witnesses during the trial, but were not examined. In the argument of the facts before the jury the counsel for the defendant insisted, that the failure of the plaintiff to introduce and examine the McRae Bros. was a circumstance of itself, which the jury was entitled to consider as unfavorable to the plaintiff, &c. After the argument was closed, the court, at the request of the plaintiff, charged the jury, that "The fact of J. S. McRae and P. C. McRae not being introduced as witnesses

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can not be considered against the plaintiff in this case." The giving of this charge is the only error assigned.

There is a rule of evidence to the effect, that a party who has it in his power to produce the best evidence, which he withholds, or leaves unexplained a material question of fact, by an intentional withholding of explanatory evidence, such conduct may give rise to unfavorable inferences against him; but this rule of evidence does not apply when the evidence withheld is of no higher degree than that introduced, is not explanatory of any fact left in uncertainty, but is purely cumulative. So far as is disclosed by the record, the testimony of the witnesses not examined would have been merely cumulative. They were present in court, and subject to the call of either party.

The question is not distinguishable in principle from that decided in *Pollak v. Harmon*, 94 Ala. 420, 11 So. Rep. 156; *Bates v. Morris*, ante p. 282.

Affirmed.

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Bill in Equity to enforce Specific Performance of a Contract.

1. *If contract can not be performed, damages should be awarded in the alternative.*—When a bill in equity is filed for the purpose of enforcing the specific performance of a contract, the assessment of damages against the defendant can not properly be made until it is shown he was, or might be unable to perform his contract, and then, not without giving him an opportunity do so; the damages in such cases being awarded in the alternative.

2. *Complainant's knowledge of defendant's inability to perform a contract defeats a bill filed for that purpose.*—If, at the time of filing a bill to enforce the specific performance of a contract, the complainant knows that the contract can not be specifically performed, his bill will not be entertained for the purpose of granting him compensation by the award of damages.

3. *When separate decrees in favor of several complainants erroneous.*—When one of two complainants in a bill seeking the specific performance of a contract derives his interest in the contract from the indorsement thereon by his co-complainant, it is error to render two separate decrees against the defendants, one in favor of each com-

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plainant; there should be but one joint decree in favor of complainants.

4. *Alleged fraudulent transfer of stock; when moneyed decree against transferee erroneous.*—In a bill seeking the specific performance of a contract for the transfer of stock in a corporation to complainants, where it is alleged that the contractor had transferred all of his stock in said corporation to his wife without consideration, and to defraud complainants, but there is no averments showing that the wife had any knowledge of, or connection with the alleged fraudulent design, it is error to render a moneyed decree against the wife, although she was a party defendant to the said bill.

APPEAL from the Chancery Court of Jefferson.

Heard before the Hon. THOMAS COBBES.

The bill in this case was filed on April 11, 1891, by the appellees, John B. Reid and L. W. McCants against Elwell Eastman and Mary E. Eastman, his wife; and sought the specific performance of an alleged contract. A copy of this alleged contract was made an exhibit to the bill, and was in words and figures as follows: "Birmingham, Ala., Nov. 30, 1888. John B. Reid, Esq., Dear sir: I make you the following proposition: that if you induce Mr. Sedden, Pres. of Sloss Co., to subscribe \$10,000 to the Tenn. City and Brown Ore enterprise, I will obligate myself to procure for you \$50,000 of stock in said enterprise. And I will further divide with you the 100,000 that I have for certain services, and further that you procure other subscribers I will obligate myself to procure for your services 100,000 additional stock in said enterprise. Respectfully, Elwell Eastman." There was the following indorsement on said alleged contract: "L. W. McCants: If you will aid me in this matter, I will divide equally with you. Yours, Jno. B. Reid."

The complainant, Jno. B. Reid, the party with whom said alleged contract was made, before the services were performed under it, on the 1st day of December, 1888, as is averred, assigned to L. W. McCants, his co-complainant, an undivided half interest in said contract.

The bill refers to the making of said alleged contract, by the said Elwell Eastman, with complainant, Jno. B. Reid, and avers that he promised, "if the said Reid would procure subscribers to the capital stock of a company, to be incorporated in the State of Tennessee, he would pay and deliver to the said Reid, for his services in procuring such subscribers, one hundred thousand dollars of the capital stock of the company to be organ-

ized " It is further averred, that complainants, acting under said contract, procured S. T. Brittle, Geo. D. Fitzhugh and others to subscribe to the capital stock of the company to be formed, and thereby enabled said Eastman to organize his contemplated company in the State of Tennessee, under the name of the Benton Iron and Land Company, and said Eastman expressed himself satisfied with the manner in which complainants performed their part of said contract; that said Eastman received 212,000 dollars worth of the capital stock of said company, or 2,120 shares of its stock, which were paid to him for the services performed by him and complainants, and he has refused, though requested, to pay and deliver to complainants the 500 shares of the stock in said company, or any part of it, to which they are entitled under their said contract, and said 500 shares are worth \$20,000; that with the view of preventing complainants from recovering their shares of said stock, the said Eastman has placed all of the stock which he owns in said company in the name of his wife, Mary E. Eastman, as appears by the books of said company, but he still owns and controls and has in his possession, the larger part of said stock; that said transfer was made without any consideration, in fraud of complainants, while said Eastman was indebted to them, and that said Eastman does not own any property in his own name, which is subject to execution.

The prayer of the bill is for an injunction restraining defendants from disposing of said stock; that on final hearing it be decreed that the assignment of said stock by said Eastman to his wife be decreed to be void against complainants; that said Elwell Eastman be required to surrender to the court 500 shares of the capital stock of said company, and that he be required to specifically perform his said contract. To this is added, a prayer for general relief. The defendants having failed to answer, decrees *pro confesso* were regularly entered against them.

The complainants examined several witnesses, whose depositions were read on the submission of the cause, who proved the services rendered by complainants, the value of the property of the company, organized partly by their efforts, and the value of the stock in said company.

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One of these witnesses, John H. Parker, testified, that he was the president of said company, and had been, since the date of its organization, and knew complainants and Elwell Eastman; that said company was organized with a capital of \$1,000,000, and the stock was paid in, at \$6 per share, which is supposed to be worth \$15 or \$25 per share; that five shares of the stock were issued to E. Eastman and still stands on the books in his name; that none was ever issued to Mary E. Eastman; that 885 shares were issued to Mamie L. Eastman, and, on July 18, 1889, 65 shares were transferred by Mamie L. Eastman to S. T. Brittle, and it still stands in his name; and on the same day, 20 shares were transferred by her to C. W. Williamson, and still stands in his name.

The court, after a reference to the register to ascertain the amount of the stock that each of the complainants was entitled to, and its value, and on the coming in of his report, rendered a moneyed decree or judgment in favor of each of the complainants, for \$7,500 against both the defendants, specifying in the decree that the amount of the separate judgment in favor of each complainant was the value of the stock agreed to be delivered to complainants, respectively. There was no decree for specific performance or for anything else, except for the recovery of said sums of money by each of the complainants. The defendants appeal, and assign this decree as error.

LANE & WHITE, for appellants.—The bill does not present a case for specific performance.—3 Brick. Dig. 419, 426. Decrees *pro confesso* are admissions of such facts only as are well pleaded, and do not aid or supplement defective averments—*McDonald v. Mobile Life Ins. Co.*, 56 Ala. 468. The decree was not in accord with the prayer of the bill, which was for the specific performance of an alleged contract; and such decree was, therefore, erroneous.—*Strange v. Watson*, 11 Ala. 325; *Thomason v. Smithson*, 7 Porter 144; 3 Brick. Dig. 378, 183.

W. R. HOUGHTON and W. A. COLLIER, *contra*.—The decree *pro confesso* is an admission of all the facts alleged in the bill.—*Johnson v. Kelly*, 80 Ala. 135; 1 Daniel Ch. Pr. & Pl., 526. The allegations of the bill show a ground of equitable jurisdiction, and, having taken jurisdiction,

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the court will settle the whole controversy.—*Freider v. Lienkauff & Strauss*, 92 Ala. 469, 8 So. Rep. 758, and authorities cited.

HARALSON, J.—I. This bill is one ostensibly for specific performance of a contract, alleged to have been made by defendant, Elwell Eastman, with complainant, Jno. B. Reid.

Without deciding whether the alleged contract is one that can be decreed by a chancery court, to be specifically performed or not,—as to which, it may be said, there are grave doubts,—yet, if the bill was filed and entertained for that purpose, an assessment of damages against defendants could not properly have been made, until it appeared that the defendant, Elwell Eastman, was, or might be unable to perform his contract, and then, not without giving him the opportunity to do so. Damages in such a case should be awarded in the alternative.

It may be accepted as a general and a correct rule, that if a complainant knows, at the time he files his bill, that the contract can not be specifically performed or decreed, the bill will not be sustained for a compensation in damages, for it would be one, then, purely for the recovery of a moneyed demand, of which a court of equity has no jurisdiction.—*Waterman on Specific Performance*, § 516; 1 Pom Eq. Jur., § 178.

This same author (*Waterman*) says: “Where the defendant deprives himself of the power to perform the contract specifically during the pendency of a suit to compel such performance, a court of equity may retain the suit, and award to the complainant compensation in damages, to prevent a multiplicity of suits. And such a decree will be proper, where the defendant has deprived himself of the power to perform the contract, prior to the filing of the bill, but without the knowledge of complainant, or, even when the defendant never had the power to perform, if the complainant filed his bill in good faith, supposing, when he brought the suit, that specific performance of the contract could be obtained. The rule assumes, of course, a sufficient contract and performance by the plaintiff, and every other element requisite on his part, to the cognizance of his case in chancery; and that, the special relief sought is defeated, not by any defense or counter equities, but simply because

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an order therefor would be fruitless from the inability of the defendant to comply. * * * Relief must then be given by a decree in the alternative, awarding damages unless the defendant should secure the specific performance sought. In many cases, this would be an effective and proper course, inasmuch as the defendant, although not having himself, at the time, the title or capacity requisite to such performance, might be able to procure it otherwise."—Waterman on Spec. Perf., § 517.

II. Nor was it proper or consistent with equity practice in such a case, to render two separate decrees against the defendants, one in favor of each complainant, for one-half of the total damages assessed against both. The decrees of a chancery court are very numerous and elastic. Speaking on this subject, Mr. Pomeroy says: "It is absolutely impossible to enumerate all the special kinds of relief which may be granted, or to place any bounds to the power of courts in shaping the relief in accordance with the circumstances of particular cases. * * * The ordinary remedies, however, which are administered by equity, those which are appropriate to the circumstances and relations most frequently arising, are well ascertained and clearly defined."—1 Pom. Eq. Pl., § 170.

It is not pretended that complainant, McCants, had any contract with the defendant, Eastman, for which he alone could sue him, either for a specific performance, or for damages. Reid simply endorsed on Eastman's proposal for a contract with him, a proposition to McCants,—“If you will aid in this matter, I will divide equally with you.” This was done, so far as appears, without the knowledge or consent of Eastman. If it were conceded that under the allegations of the bill, McCants, having aided Reid to get up the stock, was a proper party plaintiff, still that did not subject defendants to a double moneyed decree. With all the elasticity and adaptability of chancery decrees to meet variant reliefs, there were no peculiar equitable considerations in the case, to make such a decree as was rendered proper. If free from any other objection, the decree should have been a joint one, in favor of complainants.

III. But, on what principle was it, that this double moneyed judgment was rendered against Mrs. Eastman? It is not averred that she had any thing to do with Mr.

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Eastman and his proposed contract with complainant, Reid, or that she ever knew about it. Nor is it averred or shown, that she had any connection with the fraud by which it is alleged her husband sought to deprive complainants of their stock. The only allegation which connects her with the case at all is, that said Eastman "has placed all of the stock of the said Benton Iron and Land Company which he owns in the name of his wife, Mary E. Eastman, as appears on the books of the company, but [he] still owns and controls said stock and has the larger part thereof in his possession." The only excuse for making her a party was, that in the event the stock was found to be in her name on the books of the company, as alleged, and complainants presented a case for relief, the court might, by its decree, divest the title out of her, and invest it in complainants, to the extent of their rights, or order her to transfer it to complainants, but, never to expose her to an absolute and unconditional moneyed judgment on such an allegation as is made concerning her. In allowing the decree *pro confesso* to be taken against her, what did she admit? Nothing to show that she knowingly had any responsible connection with this matter whatever. Surely a judgment should not have been rendered against her, on an allegation of fraud committed by her husband, with which it is not alleged she had any knowledge or connection.

IV. It may be, that under the authorities, *Mamie L.* could be taken and held to be identical with *Mary E. Eastman*, but to avoid any question as to the identity of the two names, it will be safer to eliminate that question from the case by an amendment.

Reversed and remanded.

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Application for Mandamus.

1. *Clerk's fees for summoning defendant's witnesses; not payable out of the fine and forfeiture fund.*—The fees of the clerk of a court for issuing subpoenas for witnesses in a criminal case at the request of a defend-
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ant, who was acquitted, can not be paid out of the fine and forfeiture fund of the county; such services of the clerk being rendered for defendant create a debt against him, and must be paid by him.

APPEAL from the City Court of Birmingham.

HEARD before the Hon. W. W. WILKERSON.

The appeal in this case is taken from the judgment of the city court dismissing an alternative writ of *mandamus*, issued to the appellee on a petition by appellant.

The petition was filed by the appellant, and alleged that he was the clerk of the criminal court of Jefferson county; that one Burns was indicted in said court for murder, and was tried and acquitted by the jury; that the petitioner, as clerk of said court, issued a number of subpoenas at the request of said Burns for witnesses on his behalf, for the issuance of which subpoenas he was entitled to certain fees; that he made affidavit to the itemized account of these fees as required by law, and presented such account to Kenneth F. Hawkins, who was, at that time, treasurer of said county, and requested that he, Hawkins, number and register the same, and pay it in its order out of the fine and forfeiture fund in his hands as said treasurer, and that the said Hawkins, as such treasurer, refused to do so. The petitioner prayed "for a rule on the said Kenneth F. Hawkins, as treasurer of said county, commanding him to show cause why a *mandamus* should not issue requiring him to number and register the said claim of petitioner, and pay the same in its order out of the fine and forfeiture fund of said county in his hands, and that upon the hearing thereof said *mandamus* be granted: or that petitioner have such other, further or different relief, or other remedial writ as in law he may be entitled to in the premises." In accordance with this prayer the alternative writ, or rule *nisi*, was issued, citing the said Hawkins to appear and show cause, if any, why the order prayed for in said petition should not be granted. This writ recited the filing of the petition by said Burgin, and also contained the several allegations contained in the said petition.

The respondent appeared and moved to quash the writ upon the following, among other grounds: 1st. That the notice did not require the defendant to do the act prayed for, or show cause why it should not be done.

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2d. Because the mandate of said rule *nisi* does not give the defendant an opportunity to comply with said writ.

3d. Because, according to the mandate of said notice, the defendant is required to do an act not authorized by law.

The motion to quash was granted by the court, to which ruling petitioner duly excepted. The petitioner appeals, and assigns this judgment as error.

WHITE & HOWZE, for appellant.—*Mandamus* is the proper remedy, and an appeal to this court is the proper mode of reviewing the judgment of the court below.—*Sessions v. Boykin*, 78 Ala. 328. The act the defendant would be required to do under a writ of *mandamus* was one authorized by law. The statute in question, being a remedial one, must be liberally and beneficially construed, and under such construction the petitioner was entitled to relief.—Acts of 1882–83, p. 543; Sedgwick on Statutes, 361; *Sprowl v. Laurence*, 33 Ala. 674; *Herr v. Seymour*, 76 Ala. 270; *Reese v. State*, 73 Ala. 18; *Toole v. State*, 88 Ala. 158, 7 So. Rep. 42; *Carlisle v. Godwin*, 68 Ala. 137; *Bartlett v. Morris*, 9 Por. 266.

B. M. ALLEN, *contra*.—The claim of the petitioner was not a proper charge against the fine and forfeiture fund, but was a claim against the defendant in the case in which the subpœnas were issued, at whose instance and for whose benefit the services were performed.—*Cohn v. Coleman*, 71 Ala. 496; *Bradley v. State*, 69 Ala. 323; *State ex rel Greene Co. v. Coleman*, 73 Ala. 551; *Bowen v. State*, 98 Ala. 83, 12 So. Rep. 808.

STONE, C. J.—Our statutes maintain a marked distinction between costs incurred for the State in State prosecutions, and those incurred for and by the defense. Code of 1886, § 4887. As illustrative of this fact, costs incurred by the State are taxable against the defendant on conviction, and become so much a part of the penalty or punishment, as that the defendant may be sentenced to hard labor for their payment; and in the event the punishment be only a money fine, or fine and costs, the defendant may obtain his liberty by confessing judgment with sureties for fine and costs. But this confessed judgment does not include the costs incurred by the defendant.

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The latter is only a personal, contract debt, and can not be enforced by restraint of defendant's liberty.—*Hill v. White*, 1 Ala. 576; *Carville v. Reynolds*, 9 Ala. 969; *Bradley v. State*, 69 Ala. 318; *Tolbert v. State*, 87 Ala. 27; *Bailey v. State*, *Ib.* 44.

In *Bradley's Case*, Brickell, C. J., speaking for the court, said: "If the defendant is convicted, the compensation claimed by his witnesses and certified by the clerk, becomes part of the costs in which he is amerced by the general judgment for costs. It is taxed as costs and collected by the sheriff for the use of the witnesses. This, however, does not change the nature or character of the compensation. It is simply a debt, a due to the witness from the defendant for services performed at his instance. Of the debt the certificate of the clerk is evidence, upon which an action at law will lie immediately, though the cause is pending and undetermined. For such debt, though it is taxable as costs, the statute can not be construed as subjecting the defendant to hard labor. It is only the costs incurred by the State, or, to which the State, if it were liable for costs, could be subjected, for the payment of which a convict may be compelled to labor. These do not include costs incurred by the defendant in making defense, whether the compensation of witnesses or the fees of officers of court for services rendered to him."

So, in *Cohen v. Coleman*, 71 Ala. 496, speaking of services rendered by the sheriff in summoning witnesses for a defendant who had been convicted, and was insolvent, we said: "Such services are rendered for the defendants, and must be paid for by them. They are not a charge against the fine and forfeiture fund."—*Bilbro v. Drakeford*, 78 Ala. 318.

In *Bowen v. State*, 98 Ala. 83, 12 So. Rep. 808, we said: "The word cost, for which a person convicted may be sentenced to hard labor, has been judicially declared. It includes all costs, including officers' fees, incurred in behalf of the State. It does not include fees due witnesses summoned on behalf of defendant, or cost incurred by him in making his defense."

In *State ex rel v. Coleman, Treasurer*, 73 Ala. 550, we defined the fine and forfeiture fund of the counties "as a fund accruing from pecuniary penalties and punitive impositions incurred by defendants in the enforcement

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of criminal prosecutions, in the nature of profits arising from our system of criminal procedure." This fund is set apart to meet those occurring and recurring liabilities which will be encountered in the administration of the criminal law. And throughout this entire proceeding, a distinction has been maintained between those expenses which have been incurred at the instance of the State, and those incurred for the defense. Hence, in section 4887 of the Code it is declared that the fees of witnesses subpoenaed for the State are made a charge on the fine and forfeiture fund, "when the defendant is not convicted," and in several other enumerated categories; but no provision is made for such payment to witnesses summoned for defendant. Can a reason be assigned for paying the clerks and sheriffs for services rendered in issuing and serving subpoenas for witnesses at the instance of defendants, which does not apply with equal force to the payment of witnesses themselves, who may be so summoned and required to attend?

Again: Under the authorities *supra*, the State is without power or authority to secure the payment of clerk's and sheriff's fees for summoning witnesses for defendants in State cases, either by judgment confessed with sureties, or by sentence to hard labor for the county. Would it not be strange and inconsistent to hold that the fine and forfeiture fund is responsible for these costs in cases in which the State fails to convict, while in case of conviction the liability is only a personal debt on the defendant, collectible only as he can be compelled to pay his other contract debts? Why secure the payment when the State fails, and yet leave its payment unsecured, when the convicted defendant can not, by reason of his insolvency, be compelled to pay these officers for the services they have rendered him at his request?

Section 4870 of the Code is very comprehensive in its terms, but we can not consent to give them an interpretation, which would work the inequality pointed out above. We adhere to our former rulings.—*Bradley v. State*, 69 Ala. 318; *Cohen v. Coleman*, 71 Ala. 496; *Bowen v. State*, 98 Ala. 83, 12 So. Rep. 808.

Affirmed.

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[L. & N. R. R. Co. v. The Peoples Street Railway & Improvement Co.]

Louisville & Nashville Railroad Co. v. The Peoples Street Railway & Im- provement Co.

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Proceedings to condemn Right of Way for Street Railroad.

1. *No appeal lies from a judgment of a probate court in condemnation proceedings to the supreme court.*—No appeal lies directly to the supreme court from any proceeding, judgment, order or decree of the probate court made or entered therein in proceedings to condemn a right of way for a railroad, as provided by the statute, (Code, §§ 3207-3220).

APPEAL from the Probate Court of Morgan.

Tried before the Hon. E. M. RUSSELL.

HARRIS & EYSTER, for appellants

W. R. FRANCIS and G. A. NELSON, *contra*.

MCCLELLAN, J.—The act of December 10, 1886, conferred upon street railroad companies the “right to condemn and take possession of” land, not exceeding a strip or tract thirty feet in width, for the right of way of such railroads, “on payment to the owner thereof a just compensation, in the same manner as now provided by law for taking private property for railroads and other public uses, in Article II, Chapter 17, Title 2, Part 3 of the Code” of 1876.—Acts 1886-7, p. 122. This act was amended by the act of February 26, 1889, which provides: “That all street railroad companies * * * organized and incorporated under the laws of Alabama * * * may acquire by gift, purchase or condemnation real estate in this State for the right of way for street railroads a strip, tract or parcel of land not exceeding thirty feet in width for the right of way of said street railroads, and said street railroad companies shall have the right to condemn and take possession of said land on payment to the owner thereof a just compensation, in the same manner as now provided by law for the condemnation of land for public uses in Article II,

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Chapter 15, Title 2, Part 3 of the Code" of 1886. Under this last statute and the article of the Code which is made (or possibly only attempted to be made, *Bay Shell Road Co. v. O'Donnell*, 87 Ala. 375, 6 So. Rep. 119,) a part of it, the Peoples Street Railway and Improvement Company proceeded in the probate court of Morgan county to condemn a right of way along a street of the town of New Decatur over the right of way, road-bed and tracks of the South and North Alabama Railroad Company, which railroad was in the possession of and being operated by the Louisville & Nashville Railroad Company, and from a decree or order of the judge of probate granting the petition to that end, and condemning said right of way, the two last named corporations appeal to this court.

We need not go into the merits of the case thus intended to be presented for our consideration further than to say that we find no authorization in the act last quoted, or in the chapter of the Code made a part of it, for the condemnation of the right of way of one railroad company, a public corporation, for a right of way for a street railway company, also a public corporation; and it has quite recently been held by this court that in the absence of special statutory authority such condemnation can not be had.—*Memphis & Charleston Railroad Company v. Birmingham, Sheffield and Tennessee River Railroad Company*, 96 Ala. 571, 11 So. Rep. 642.

But we are not required to decide that question, nor indeed would it be proper for us to go further than is implied from what we have said, for the reason that this case is not jurisdictionally before us. No appeal lies directly to this court from any proceeding, judgment, order or decree of the probate court had, entered or made therein under the provisions of Article II, Chapter 15, Title 2, Part 3 of the Code, under which this proceeding was had in the probate court of Morgan county. *Postal Telegraph Cable Co. v. Alabama Great Southern Railroad Company*, 92 Ala. 331, 9 So. Rep. 555.

This appeal must, therefore, be dismissed; and this though no motion to that end has been made, since, being without jurisdiction in the premises, no waiver of the point, implied or even expressed, can confer upon us the power to hear and determine the cause.

Appeal dismissed.

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[North Alabama Development Co. v. Short.]

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Action on Promissory Note.

1. *Promises to pay the debt of another.*—A promise of one person to pay a debt due from him to another, for a valuable consideration, ensures to the benefit of the latter, if he elects to claim the benefit thereof; and he may sue in his own name to recover the amount so agreed to be paid.

APPEAL from the Circuit Court of Franklin.

Tried before the Hon. H. C. SPEAKE.

This action was brought by Albert Short against the North Alabama Development Company; and counted on a promissory note made by one A. Parish to the plaintiff, and assumed and agreed to be paid by the North Alabama Development Company, in part payment of the purchase money for certain land purchased from A. Parish. The only question in the case presented on this appeal, and which is decided, is sufficiently shown in the opinion. The cause was tried by the court without the intervention of a jury, and after hearing the evidence, the court rendered judgment for the plaintiff. Defendant appeals, and assigns as error the rendering of this judgment.

ROULHAC & NATHAN, for appellant.

ALMON & BULLOCK, *contra*.

COLEMAN, J.—Albert Short, the owner of certain real estate sold and conveyed the same to one A. Parish, who executed to his vendor, Short, his promissory note for six hundred dollars. Parish sold the same land to the North Alabama Development Company, the consideration being, that the North Alabama Development Company “assumed and agreed to pay at maturity the note executed by Parish to Short.” Short was not a party to the conveyance and agreement between Parish and the North Alabama Development Company. The

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only question in the case is, whether Short can maintain an action in a court of law against the North Alabama Development Company, on its covenant and agreement with Parish, its vendor, to pay the Short debt. Whatever may be the rule in other States, it is not an open question in this State. In *Dimmick v. Register*, 92 Ala. 458, 9 So. Rep. 79, the court uses this language: "It was a promise the creditors could claim the benefit of, and on which they could maintain an action in their own names. The debt became *prima facie* a debt to them, and Wilkins and associates (the person making the sale) could maintain no action upon it, unless the creditors repudiated the substitution, or, the promise not being kept, coerced or took steps to coerce payment from the original debtor. We discussed these questions so fully, both on reason and authority, in *Young v. Hawkins*, 74 Ala. 370 and *Coleman v. Hatcher*, 77 Ala. 217, that we deem it unnecessary to further reproduce the argument. The promise enured to the benefit of the creditors, and *prima facie*, they alone can claim payment or sue for the breach of the agreement. See also *Huckabee v. May*, 14 Ala. 263; *Lockwood v. Nelson*, 16 Ala. 294; *Mason v. Hall*, 30 Ala. 599."

The precise question, and upon a contract containing the exact covenant and assumptions as in the case at bar, was recently decided in the circuit court for the Northern District of Alabama in the case of the *North Alabama Development Co. v Orman*, and the court held that Orman could maintain the action, citing the Alabama cases *supra*.

There was no error in the judgment rendered.
Affirmed.

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Statutory Action of Ejectment.

1. *Petition for sale of lands to pay decedent's debts; sufficient arrangements.*—A petition by an administrator for an order to sell lands belonging to the estate of his intestate for the payment of his debts, Vol. 101.

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(Code, §§ 2104, 2106), which alleges that "the personal property of said estate is insufficient for the payment of the debts thereof, and that therefore it is necessary, and will be to the interest of said estate, to sell the lands hereinafter named, for the payment of the debts of of said estate," is sufficient to confer jurisdiction on the probate court to decree a sale of said lands.

2. *Decree of sale of decedent's lands; presumption in favor of the decree of the probate court on collateral attack.*—When, in an action of ejectment, a decree of the sale of decedent's lands is attacked, on the ground that the evidence in the proceedings in the probate court was not taken in the manner required by statute, (Code, §2111), the order of sale of said lands by the probate court is not set out in the record, but the statement is made that the court rendered a decree ordering said lands to be sold for the payment of the debts of said estate, this court, on appeal, will presume that the order or judgement of the probate court contained all that was necessary to uphold its validity, including the finding that proof of the necessity of the sale to pay the debts was made by disinterested witnesses, as provided by the statute, and that such order was sufficient.

3. *Order of sale collaterally attacked; error must affirmatively appear on the face of the record.*—When a decree of the probate court ordering the sale of the decedent's lands for the payment of debts is collaterally attacked, the decree will not be annulled and set aside, unless the matters relied on as avoiding the adjudication appear affirmatively on the face of the record.

APPEAL from the Circuit Court of Montgomery.
Tried before the Hon. JOHN P. HUBBARD.

This was a statutory action of ejectment, brought by the appellants, against the appellees on April 21, 1890. The cause was tried upon an agreed statement of facts, from which it appeared that the plaintiffs were the heirs-at-law of Randolph Kent, who died intestate, and that the defendants were the children and grand-children of William M. Mansel, deceased, and Elizabeth Mansel, deceased, to whom dower right was assigned as the widow of said William M. Mansel, and that the lands sued for in this action were the lands which were assigned to said Elizabeth Mansel as her dower in the lands of her deceased husband, William M. Mansel. It further appeared from the agreed statement of facts that Wm. M. Mansel, a resident of Montgomery county, died intestate on the 31st of May, 1875, being the owner of 360 acres of land in said county, which is described in said statement of facts; that on the 4th October, 1875, Wm. T.

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Hatchett was appointed administrator of his estate by the probate court of Montgomery county; that on the 30th October, 1876, said Hatchett, as administrator, filed a petition in the probate court of said county, to sell said lands to pay the debts of said estate. The allegations of said petition, important to be considered, are, "that the personal property of said estate is insufficient for the payment of the debts thereof, and that, therefore, it is necessary and will be to the interest of said estate, to sell the lands hereinafter named for the payment of the debts of said estate." Certain minors, whose names are given, were interested in said estate. On the trial of said petition, the evidence of two witnesses, one by the name of William T. Hatchett, and the other H. W. Clark, was taken by deposition, as in chancery cases, to show the necessity for the sale. It does not appear, whether the witness William T. Hatchett is the same William T. Hatchett, who was the administrator of the estate, but it does appear, from the deposition of the witness H. W. Clark, that he (Clark) was a creditor of the latter. He swore, "I am a creditor to the amount of \$250, with interest from the 17th day of April, 1875, balance due for the purchase money of lands." But he did not know who else were creditors of said estate. Said witness Wm. T. Hatchett, swore, that said estate owed debts to the amount of about \$300. On the 25th January, 1877, the probate court of Montgomery county, on this petition and evidence, rendered a decree ordering the lands of the estate described in the petition to be sold for the payment of its debts, and a sale was, accordingly, made by the administrator on March 26, 1877, at which, H. W. Clark became the purchaser at the price of \$750, which sale was reported to and confirmed by said probate court, and a deed of conveyance was ordered to be made to said purchaser, and the administrator, accordingly, on the 8th of November, 1878, by deed duly executed, conveyed to said Clark, all the "claim, right, title and interest of the said Wm. M. Mansel, deceased," in and to said lands. The order of sale made by the probate court is not set out in the record. All that appears on that subject is, "that on the 25th day of January, 1887, the probate court of Montgomery county, rendered a decree ordering said lands to be sold for the payment of the debts of said estate of Wm. M. Mansel, deceased."

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It further appears, that on the 11th September, 1878, the lands sued for in this action, which are a part of the lands which were sold by said administrator to pay debts, were duly set apart, by the order and decree of the probate court of Montgomery county, to Elizabeth Mansel, the widow of the intestate, as her dower, and she went into the possession of them, and that she and those claiming under her have had possession of said dower lands ever since; that said widow, about the year, 1883, moved to Texas, where she died on the 17th day of October, 1888.

It also further appears, that H. W. Clark and wife, on the 12th of September, 1881, conveyed said lands, purchased by him at said administrator's sale,—which included the dower lands now sued for,—to Randolph Kent; but, as to the lands set apart as dower he sold only the reversionary interest, after the termination of the widow's dower interest in them; that said Kent was put in the possession of said lands, except that portion set apart as dower, and afterwards, died intestate, leaving the plaintiffs as his sole heirs-at-law, and they and the defendants claim title derived from the said William M. Mansel. The record does not show upon what plea the cause was tried. The court gave the general charge for the defendants and refused the same charge for the plaintiffs. There was judgment for the defendants. The plaintiffs appeal, and assign as error the giving of the charge requested by the defendants, and the refusal to give the general affirmative charge requested by the plaintiffs.

E. P. MORRISSETT and A. A. WILEY, for appellants.—The petition for the sale of William M. Mansel's lands by his administrator, conferred jurisdiction upon the probate court to order the sale of said lands.—*Cotton v. Holloway*, 96 Ala. 544, wherein the case of *Abernathy v. O'Reilly*, 90 Ala. 495, 7 So. Rep. 919, is overruled. The judgment or decree of the probate court ordering the sale of the land of the estate of William M. Mansel, deceased, was final and conclusive, not only as to all facts and issues decided, but upon all points which were necessarily involved in the matter adjudicated. *Meadows v. Meadows*, 73 Ala. 356; *Landford v. Drunklin*, 71 Ala. 594; *King v. Kent*, 29 Ala. 542; Code of Ala., §

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2104. This court will presume in this proceeding that the evidence to establish the necessity for the sale of the lands, in the probate court, was ample and sufficient, and that the statutory requirements were complied with in the taking of depositions.—*Beadle v. Davidson*, 75 Ala. 494; *Guilmartin v. Wood*, 76 Ala. 204; *Strang v. Moog*, 72 Ala. 460; *McDonald v. Mobile Life Ins. Co.*, 65 Ala. 358; *Ex parte Sims*, 44 Ala. 248; *Ex parte Morris*, 44 Ala. 361; *Well's Res Adjudicata*, § 217.

GEORGE F. MOORE and WILLIAM W. HILL, *contra*.—(1) The witnesses by whom the necessity for the sale of the lands was proved, in the probate court, were not disinterested witnesses as required by the statute, and, therefore, the purchaser did not obtain the legal title to the lands purchased, and could not convey a legal title to his vendee, Randolph Kent, who was the ancestor. *Stevenson v. Murray*, 87 Ala. 442, 6 So. Rep. 301; *Wilson v. Holt*, 83 Ala. 528. (2.) The petition for the sale of the lands by the administrator of the estate of William Mansel was not sufficient to confer jurisdiction upon the probate court for the sale of the lands.—*Abernathy v. O'Reilly*, 90 Ala. 495, 7 So. Rep. 919; *Bingham v. Jones*, 84 Ala. 202, 4 So. Rep. 409; *Meadows v. Meadows*, 73 Ala. 356; *Robertson v. Bradford*, 73 Ala. 116; *Robertson v. Bradford*, 70 Ala. 385; *Tyson v. Brown*, 64 Ala. 244; *Wilburn & Co. v. McCalley*, 63 Ala. 436.

HARALSON, J.—Under *Abernathy v. O'Reilly*, 90 Ala. 495, 7 So. Rep. 919, the petition in this case would be insufficient to support the sale; but, that case has been overruled, and we have since held the same averments, in other petitions, to be sufficient.—*Cotton v. Holloway*, 96 Ala. 544, and *Smith v. Brannon*, 99 Ala. 445.

Section 2111 (2455) of the Code provides, in cases for the sale of lands for the payment of the debts of an intestate, that "the applicant must show to the court, that the personal property of the estate is insufficient for the payment of debts; and such proof must be made by the deposition of disinterested witnesses." The point is made in this case, that the proof that the personal property of the estate was insufficient to pay its debts, was made by interested witnesses, and the order of sale is, therefore, void.

The two witnesses examined were Wm. T. Hatchett
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and H. W. Clark. It nowhere appears that Wm. T. Hatchett, the administrator of the estate, was the same person who was examined in the proceeding as a witness. Identity of name, as has been held, is presumptive evidence of identity of person, in the absence of evidence showing that the name is borne by two or more persons in the same community.—*Garrett v. State*, 76 Ala. 18; *Wilson v. Holt*, 83 Ala. 529, 3 So. Rep. 321; *Stevenson v. Murray*, 87 Ala. 445, 6 So. Rep. 301.

H. W. Clark, as his evidence taken in that proceeding shows, was a creditor of the estate, whose debt was to be paid out of the proceeds of the sale; but, if interested on that account, which it is unnecessary to determine, or if said Hatchett was in fact an interested witness, such interest, on the part of either or both of the witnesses, can not affect the conclusion we reach. The order of sale of said lands, made by the probate court, is not set out in the agreed statement of facts appearing in the transcript, on which the case was tried in the circuit court. The statement is made, simply, that the court rendered a decree ordering said lands to be sold for the payment of the debts of said estate.

The duty devolved on the probate court, having acquired jurisdiction in the premises, to determine whether or not the evidence in the proceeding had been taken in the manner required by the statute, upon which a valid order of sale could be made, and was sufficient for that purpose, and if the court found it was so taken and was sufficient, the adjudication is final and conclusive on all persons, however erroneous, unless set aside on appeal.—*Goodwin v. Sims*, 86 Ala. 107, 5 So. Rep. 587.

We must presume, that the order or judgment of the court contained all that was necessary to uphold its validity, including the finding, that proof of the necessity of the sale to pay the debts was made by disinterested witnesses, and was sufficient. We have recently held, that proof by one such witness was sufficient.—*Thompson v. Boswell*, 97 Ala. 570, 12 So. Rep. 809.

We have been referred to the case of *Stevenson v. Murray*, *supra*, as supporting the contention of appellees. But, it is there expressly and correctly stated, that "when the attack [on an order of this character] is collateral, either by the validity of the order being drawn in question incidentally, in other suits or proceedings,

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[as is the case here], or by a petition to vacate the decree made, in and at a subsequent term of the court which rendered it, the rule is well settled with respect to this, as well as all other judgments and decrees in cases in which jurisdiction has attached, that the matter relied on as avoiding the adjudication must appear affirmatively on the face of the record."—*Pettus v. McClannahan*, 52 Ala. 55.

Presuming, as we must, that no such invalidity appears on the face of the order of sale, we hold that the court erred in giving the general charge in favor of defendants, and in refusing to give it for the plaintiffs.

Reversed and remanded.

Herring et al. v. Ricketts et al.

Application to Vacate the Probate of a Will.

1. *Probate of a will; service of notice on infants.*—In a proceeding for the probate of a will, service of notice upon infants next of kin by handing them a copy is insufficient to bring them into court; the copy should have been left with the father, mother, guardian, or other person having the custody of the minors.

2. *Appointment of guardian ad litem for infants.*—Until infants are brought into court by a service of process, according to the rules of practice, the appointment of a guardian *ad litem* for them is unauthorized, irregular, and not sufficient to support a decree against them.

3. *Probate of a will; notice thereof.*—If a will is admitted to probate without legal service of notice upon the persons who are by law entitled thereto, the probate will be vacated and revoked on their application.

4. *Application to vacate probate of a will; no presumption in favor of the probate.*—On the application to vacate the probate of a will, there is no presumption in favor of the order of probate, the petition to vacate being a direct and not a collateral attack.

APPEAL from the Probate Court of Jefferson.

Heard before the Hon. M. T. PORTER.

This proceeding was commenced by a petition addressed to the probate judge to set aside, annul and vacate the probate of the will of Mary A. Thompson, deceased. The petition was filed by Mattie J. Herring and others

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against W. A. Ricketts, administrator *de bonis non*, and others. All the facts that are necessary to an understanding of the decision of this court are sufficiently stated in the opinion.

On the final hearing of the cause, the probate court refused the prayer of the petition, and dismissed the same. Hence this appeal.

MCGUIRE & COLLIER and J. M. RUSSELL, for appellants.—There was no sufficient service upon the infants, next of kin of the proponent in the proceedings to probate the will.—*Bruce v. Strickland*, 47 Ala. 195; *Ingersoll v. Mangam*, 84 N. Y. 624; 24 How. 202; 62 How. 46; 17 Abb. (N. C.) 100; 83 N. Y. 113; 15 N. Y. 158; 11 N. E. Rep. 885; *Cook v. Rogers*, 64 Ala. 408; *McIntosh v. Atkinson*, 63 Ala. 241; *Hodges v. Wise*, 16 Ala. 509; 4 Ala. 248; 19 Ala. 810; 1 Ala. 495; 37 Ala. 571; 63 Ala. 241; 72 Ala. 322. The petitioners in the present case were entitled to have the probate of the will vacated and revoked.—4 Ala. 248; 6 Ala. 166; 15 Ala. 495; 19 Ala. 810; 21 Ala. 587; 27 Ala. 597; 30 Ala. 88; 40 Ala. 245; 47 Ala. 295; 64 Ala. 410; 81 Ala. 430.

WEBB & TILLMAN, *contra*.—In the probate of wills, the probate court is a court of general jurisdiction, and every intendment must be indulged in favor of its acts. *Acklen v. Goodman*, 77 Ala. 522; 2 Brick. Dig. 530, § 83. The probate of a will is a proceeding *in rem*, not void, but voidable for irregularities.—*Kumpe v. Coons*, 63 Ala. 455; *Dickey v. Lann*, 81 Ala. 425, 8 So. Rep. 195. If there were irregularities in the probate of the will, it was the court's duty to re-probate the same.—*Bradley v. Andress*, 27 Ala. 596.

McCLELLAN, J.—This is a proceeding in the probate court to set aside, annul and vacate the probate of the will of Mary A. Thompson, deceased. The application for probate was filed by Wm. M. Thompson, one of the next of kin of the testatrix. He was a minor, as were also all the next of kin, six in number, four of them being under fourteen, and one, the youngest, only three years of age. The grounds of the present application are, that notice of the proceeding for probate was never

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legally served on these infants, and that no guardian *ad litem* was appointed, or consented to act, or is shown by the record to have acted for them on the hearing of the petition for probate.

The record shows that service of the notice was made, in each instance, by handing a copy to the infant next of kin. By all the authorities this was not a sufficient service upon them: the copy should have been left with the father, mother, guardian, or other person having the custody of the minor defendants.—Warner on Service, 6; *McIntosh v. Atkinson*, 63 Ala. 241; *Cook v. Rogers*, 64 Ala. 408; *Carter v. Ingraham*, 43 Ala. 78; *Gayle v. Johnston*, 80 Ala. 395. Statutes and rules of this court prescribing the manner of service upon infants are strictly construed, and must be strictly complied with.—*Coster v. Bank of Georgia*, 24 Ala. 37; *Carter v. Ingraham*, 43 Ala. 78. There was, therefore, more than mere irregularity of service on the next of kin of the testatrix; there was in truth no legal service at all upon them, and they were not before the court.—*Bruce v. Strickland*, 47 Ala. 195.

There being no service upon these infants, the appointment of a guardian *ad litem* for them was unauthorized, and, to say the least, irregular; and this, of course, though the appointee consented to act, and appearance of such guardian had in other respects been formal and regular.—10 Am. & Eng. Encyc. of Law, pp. 690–91; *Clarke v. Gilmer*, 28 Ala. 266; *Bondurant v. Sibley's Heirs*, 37 Ala. 565; *McIntosh v. Atkinson*, *supra*; *Cook v. Rodgers*, *supra*; *Irwin v. Irwin*, 57 Ala. 614.

Under the settled doctrine of this court, applicable to the state of case presented by this record, the probate court, in our opinion, should have granted the petition of appellants, Herring and others, and, in consonance with its purpose and prayer, have vacated, set aside and revoked the probate of the will of Mary A. Thompson, deceased. As was said in *Kirby v. Kirby*, 40 Ala. 495: “Under a practice established in this State by a series of decisions, which from their long standing should not now be questioned, it is settled that any distributee of the estate of the testator, entitled to notice of the probate of the will, and not having received such notice prior to the probate, may make an application to the court in which the will was probated to vacate and revoke the

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probate, and that the same should be granted, if it appear that the applicant was entitled to notice, and none was given."—*Roy v. Segrist*, 19 Ala. 810; *Bradley v. Andress*, 27 Ala. 596; *Lovett v. Chisolm*, 30 Ala. 88; *Hall's Heirs v. Hall*, 47 Ala. 290, 295; *Dickey v. Vann*, 81 Ala. 425, 8 So. Rep. 19.

This application does not proceed on the theory that the probate of the will was void, but that it was irregular, erroneous and voidable; and being a direct and not a collateral attack, the concession that the probate court is one of general jurisdiction in respect of the probate of wills, and that the usual presumptions of regularity and validity incident to the judgments of such courts are to be indulged in support of the order of probate here made, will not avail the appellee. It is no more competent to support the probate of this will by such presumptions on this proceeding, than it would be on appeal. The argument in this connection would be forceful if this were a collateral attack. Being direct, however, these considerations are of no importance.

Of course, when the probate of a will is set aside and vacated on the application of one who, being entitled to, had not notice of the proceeding to that end, the paper may again be propounded for probate, and probated; but the existence of this right affords no ground to deny the application for the vacation of the irregular probate. The two proceedings are entirely distinct; and, indeed, a second probate can not be had until the first, and merely avoidable one, has been vacated. When this has been done, the proceeding for probate is *de novo*, and must conform, of course, to statutory requirements, in all respects as if the original irregular probate had not been decreed.

Without going into the question as to the formality and regularity or sufficiency of the record in respect of the guardian *ad litem*, aside from the infirmity of his appointment resulting from a want of service upon infants, it is clear, we think, that the probate court erred in denying the application to vacate the probate, and its judgment must be reversed. The cause will be remanded.

Reversed and remanded.

Elliott v Sibley, et al.

Bill by Stockholder to enjoin a Corporation from the Sale of Stock, and to remove Directors from Office.

1 *Bill to enjoin sale of stock; corporation necessary party.*—Where a bill is filed by a stockholder to enjoin the sale by a corporation of his stock to settle an indebtedness due to the corporation, upon the ground that the debt is not due, or has been paid, or that the corporation is indebted to the shareholder in an amount exceeding that claimed to be due the corporation, and which prays for a settlement of account, the corporation itself is an indispensable party.

2. *Same; complainant must offer to do equity.*—In a bill, filed by a stockholder to enjoin the sale of his stock by a corporation, on the ground that the corporation is indebted to him in an amount exceeding his indebtedness, and which also prays for a settlement of account, the complainant must offer to do equity by averring in his bill a readiness and willingness to pay whatever amount may be ascertained to be due from him to the corporation.

3. *Enforcement by a corporation of a lien under section 1674; no action by directors necessary.*—In order that a corporation may enforce the lien given it by statute, (Code, § 1674), against a stockholder to collect a past due indebtedness from him, there is, *prima facie*, no action necessary on the part of the directors; and the averment in the bill filed by a stockholder to enjoin the sale of his stock to collect a debt fixed by contract, that the directors of the corporation have taken no action to authorize the threatened sale, can not give the bill equity.

4. *Regularity of election of officers of a corporation; inquiry by court of equity.*—A court of equity will inquire into the regularity of the election of the directors of a corporation only when the question arises incidentally or collaterally in a suit of which the court otherwise has jurisdiction, and the granting of the relief prayed for depends upon its decision.

5. *Bill to remove directors of a corporation from office; want of equity.* When, in a bill filed by a stockholder to enjoin the sale by the corporation of his stock, and which also prays for the removal from office of certain persons claiming to be directors of said corporation, there are no averments which show that complainant's defense to the claim of the corporation is in any way affected by acts of the alleged illegal directors of the corporation, the bill, while perhaps not multifarious, is wanting in equity, so far as it seeks to have the said directors removed from office.

6. *Dissolution of injunction.*—When an answer to a bill seeking an injunction specifically denies the principal allegations of the bill, upon

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rests the right of the relief asked, the temporary injunction is
erly dissolved.

Bill to enjoin sale of stock; necessary averments.—In a bill by a
holder to enjoin the sale by the corporation of his stock, in pay-
of his debt to said corporation, on the ground that he has a
against the corporation in excess of his alleged indebtedness,
complaint must aver some fact other than the existence of his de-
t, which is a proper subject of set-off in order to give his bill
y—such as the insolvency of the corporation, or any other fact
ecting his alleged claim, which would justify the interposition of
rt of equity.

PEAL from the Chancery Court of Cherokee.

heard before the Hon. S. K. McSPADDEN.

the bill in this case was filed by the appellant, J. M.
ott, on November 21, 1891, against William C. Sibley
resident of the Round Mountain Coal and Iron Com-
y, J. W. Davis, J. M. Clark and Charles H. Phinize ;
prayed to have the defendant Sibiey, as president of
said corporation, enjoined from selling certain shares of
k alleged to have been owned by the complainant,
to have the other defendants removed from their re-
tive offices, as directors of the Round Mountain Coal
on Co. The ground upon which the injunction was
d, as stated in the bill, was that the said corporation
indebted to the complainant in an amount in excess
e debt due from the complainant to said corporation ;
that the claims of complainant for the alleged
unt were based upon a resolution adopted at a meet-
of the directors of said corporation, among whom
e the defendants sought to be removed from the di-
ory. The bill also averred that the defendants J. W.
is, J. M. Clark and Charles Phinize were not of the
l board of directors of said corporation, never
ng been legally elected. The Round Mountain Coal
on Company was not made a party to the bill.

a their answer the defendants denied the fact of any
btedness from the corporation to the complainant,
also denied every material allegation of the bill,
n which the complainant seeks relief. The other
ssary facts are sufficiently stated in the opinion.
defendants moved to dissolve the injunction on the
als of the answer, and to dismiss the bill for the
t of equity, and also demurred to the bill, among
rs, upon the following grounds: 3. The Round

Mountain Coal & Iron Company is a necessary party to the suit. 4, 12 and 13. Said bill does not aver a readiness and willingness on the part of complainant to pay what may be due to said corporation. 7. No authority or order by the board of directors is necessary for the sale of stock of a corporation in payment of the debt of one of its stockholders. 8. The claim of the complainant for improvements upon the property of the Round Mountain Coal & Iron Company is not a proper charge against the present respondents. 9. The bill presents matters which are not proper subjects for adjustment and cognizance by a court of equity. 15 and 18. The bill is multifarious in that it seeks to enjoin the sale of stock, and at the same time remove from office members of the board of directors alleged to have been improperly elected. 17. There is a misjoinder of parties, in that William C. Sibley, the rightful president, is joined with those alleged to be illegal directors.

On the submission of the cause upon the motions and the demurrer, the chancellor sustained the grounds of demurrer stated above, and granted the motion to dissolve the injunction upon the denials of the answer, and overruled the motion to dismiss the bill for the want of equity. The complainant brings the present bill, and assigns as error this decree of the chancellor.

CARDEN & DANIEL and BILBRO & DORTCH, for appellants, cited *Moses v. Tompkins*, 84 Ala. 613, 4 So. Rep. 763; *Perry v. Tuscaloosa Cotton Seed Oil Mill Co.*, 93 Ala. 364, 9 So. Rep. 217; *Bliss v. Anderson*, 31 Ala. 612.

J. L. BURNETT, *contra*, cited Cook on Stock & Stockholders, §§ 115, 134, 600, 746, n. 3; *Moses v. Tompkins*, 84 Ala. 613, 4. So. Rep. 763; *Tutwiler v. Tuscaloosa Coal, Iron & Land Co.*, 89 Ala. 391, 7. So. Rep. 398; *M. & C. R. Co. v. Grayson*, 88 Ala. 572, 7 So. Rep. 122; *Nelson v. Hubbard*, 96 Ala. 238, 11 So. Rep. 428; 23 N. J. Eq. 216; 20 N. J. Eq. 122.

COLEMAN, J.—The object of the present bill was to enjoin Sibley, the president of the Round Mountain Coal & Iron Co., a corporation, from selling certain shares of stock, belonging to complainant Elliott, and also to have removed from office certain persons claiming to be directors of said corporation.

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The bill avers that Sibley advanced to complainant five hundred dollars in money, for which complainant executed his note, to be expended by complainant in the payment of a law-suit, in which the corporation was interested, and fifty shares of stock were placed in the hands of Sibley as collateral for the advance of the money; that the five hundred dollars were expended according to agreement, and afterwards Sibley transferred the note and shares to the corporation. The bill also avers that the corporation claimed an indebtedness from complainant on a rental contract of over three thousand dollars, and to pay this alleged indebtedness, Sibley the president, was proceeding to sell complainant's shares of stock; but that, in fact, on a settlement of accounts, there would be a balance due complainant, over and above the total indebtedness, of more than four thousand dollars. A temporary injunction issued upon the filing of the bill. Respondents moved to dismiss the bill for want of equity, demurred to the bill, assigning various grounds of demurrer, and, upon the denials of the answer, moved to dissolve the injunction. At the hearing, the motion to dismiss the bill for want of equity was denied. Several grounds of demurrer were held to be good, and the injunction was dissolved. From the rulings of the court, involving the injunction, and sustaining certain grounds of demurrer the complainant appealed.

The bill requires neither argument nor citation to show that there is a bill is filed to enjoin the sale of stock of a shareholder to satisfy an indebtedness due the corporation, on the grounds that the debt is not due, or has been paid, or that the corporation is indebted to the shareholder in an amount exceeding that claimed to be due the corporation, and which prays for a statement of account, the corporation itself is an indispensable party: it is also elementary, that in such a bill, mutual indebtedness existing, the complainants should offer to do equity, — should aver a readiness to pay whatever may be found due from him, upon the statement of the account. It may be that to authorize a suit for an unpaid subscription for stock there should be some action on the part of the directors, as was declared in *Moses v. Tompkins*, 84 Ala. 4 So. Rep. 763; though this would depend somewhat upon the character of the subscription and the charter or by-laws of the corporation.—Chapters VII,

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and VIII of Cook on Stocks & Stockholders. But these principles have no application where the corporation is proceeding to collect a past due debt, fixed by contract between the parties, and for which the other stockholders are in no way liable. On such an indebtedness the debtor, although a stockholder, is treated as a stranger. Section 1674 of the Code declares a lien upon the shares of stockholders for any debt or liability incurred to the corporation by such stockholder and provides for the sale of the same. To enforce such a lien, *prima facie*, no action is necessary on the part of the directors.

These principles dispose of all the errors assigned as to the ruling of the court upon the demurrers to the bill, except that of multifariousness.

It is urged that the bill is multifarious in this, that the bill seeks to enjoin the sale of complainant's stock, and in the same bill, it is sought to enjoin certain parties from acting as directors on the ground that their election was illegal and void. The rule declared by this court is, that "a court of equity will not primarily take jurisdiction to determine the legality of an election of directors or to remove a director who is in possession of the office. The court will enquire into the regularity of the election, or the right of the person to the office, only when the question arises incidentally and collaterally in a suit of which the court has rightful jurisdiction and the grant of relief depends upon its decision."—*Perry v. Tuscaloosa Cotton Seed Oil Mill Co.*, 93 Ala. 364, 9 So. Rep. 217; *Nathan v. Tompkins*, 82 Ala. 437, 2 So. Rep. 747.

The relief sought in the present case is against the corporation. The validity of the claims of the corporation against the complainant, and his defense to the note, and the rightfulness of his claim for improvements, which he avers to be in excess of his indebtedness for rent to the corporation, in no way depend upon any act of the alleged illegal directors or of the corporation since their election. The note for five hundred dollars passed to the corporation before their election, and the rental contract was executed prior to their election. Whether, therefore, the election of these directors was legal or illegal can have no influence upon his right to relief. We hold, therefore, complainant's bill does not present a case which will authorize a

of equity to enquire into the legality of the election of the directors. It does not present a case so much of multifariousness as a want of equity in this respect. We have not overlooked the fact, that complainant's claim for improvements seems to be based on a resolution adopted at the meeting of the directors, alleged by complainant to have been an illegal meeting of directors.

Upon the denials of the answer the court decreed a dissolution of the injunction. The rule is not inflexible, and a temporary injunction will be dissolved, upon the facts of an answer, however definite and specific. Facts and circumstances attending each case should be considered, and whether and how far the denials of the answer are sustained by them. The consequences to the parties should enter into and weigh in forming a proper conclusion. Amendable defects are to be considered as amended when there is equity in the bill.—*East Tenn. R. R. Co. v. East Tenn. Va. & Ga. R. R. Co.*, Ala. 275. We are clear that as to the shares of stock pledged as collateral security for the payment of the note for five hundred dollars, the injunction was properly dissolved. The allegations of the bill, that the money advanced to complainant to be expended in the payment of a law-suit is specifically denied. The execution of a note, which apparently bears interest, and the pledge of the stock to secure its payment do not comport with complainant's claim, but tend to support the averment of the respondent, that the note was executed for an advance of money to complainant.

As to the claim of complainant for improvements which exceeds the debt due from him for rent, which complainant asked to be applied in extinguishment of his own indebtedness, the principle which governs was stated in *Gafford v. Proskauer & Co.*, 59 Ala. as follows: "But if it becomes necessary for the mortgagor to resort to equity for relief upon the ground that he has a proper set-off against the mortgagee, he must show some other fact, than the mere existence of the demand which is the proper subject of set-off." The bill does not aver the insolvency of the Round Mountain Coal & Iron Co., or any fact in respect to the alleged claim for improvements, which justifies the intervention of a court of equity, to enjoin the sale of the

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stock, for the payment of the debt admitted to be true. *Tate v. Evans*, 54 Ala. 16. In fact the corporation is not even a party defendant to the bill. But considering all necessary averments and amendments made, the specific denials of the answer, the resolution of the board of directors authorizing the improvements, the failure of the bill to bring complainant within the terms of the resolution, upon which he bases his claim, we think the court was justified in decreeing a dissolution of the injunction.

There is no error in the record available to appellant, and there are no cross assignments of error by appellee. Affirmed.

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Bill in Equity to set aside the Cancellation of a Mortgage, and to foreclose it.

1. *Application of a payment on a debt; right of creditor in absence of specific direction.*—A debtor may, at the time of payment, direct its application; but if, at the time of payment, he is indebted to the same creditor in two separate accounts, and fails to give any direction as to how the said payment shall be applied, the creditor has the right to apply it to either one of his debts; and when so applied, at the time of payment, both parties are bound by such application, which can not be changed except by mutual consent.

2. *Burden of proving specific direction.*—The burden of proving an alleged specific direction as to the application of a payment upon a debt to a creditor, is upon the debtor who affirms such special direction.

3. *Cancellation of mortgage by mistake; application of a payment.*—Defendants owed complainants on a mortgage and on an open account, and, a payment having been made by defendants, the mortgage was surrendered, as complainants alleged, through a mistaken impression of one of their employés that the mortgage debt had been paid. Defendants testified that they called for a statement of their "mortgage account," and complainants' bookkeeper testified that they called only for a statement of their open account, which he furnished. There was no such account on complainants' books as a "mortgage account," and the amount paid by defendants was the exact amount of the open account. Defendants knew that the money paid by them was less than

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the mortgage debt. Complainants produced in evidence the statement of the open account which they claimed to have furnished, while defendants failed to produce the statement of the "mortgage account," which they alleged was furnished them. *Held*, that the payment was on the open account, and that the mortgage was surrendered by mistake.

APPEAL from the City Court of Montgomery, in Equity.

Heard before the Hon. THOS. M. ABRINGTON.

The bill in this case was filed by the appellees, Marks & Gayle, against the appellants, Kent & Barnett, on November 7, 1891; and sought to have annulled and set aside the cancellation of a certain mortgage, given by respondents to the plaintiffs, and then to have the said mortgage foreclosed. The facts of the case are sufficiently stated in the opinion. Upon the final submission of the cause, on the pleadings and proof, the chancellor granted the relief prayed for. The defendants appeal, and assign as error this decree of the chancellor.

JOHN GINDRAT WINTER, for appellants.—(1.) The debtor has the right to direct the application of payment if made at the time of payment.—*McCurdy v. Middleton*, 82 Ala. 137, 2 So. Rep. 721. (2.) A mistake to justify the annulling of the cancellation of a mortgage must be mutual.—*Porter v. Collins*, 90 Ala. 510; 8 So. Rep. 80. (3.) Courts of equity will not interfere unless the mistake is shown by clear and satisfactory proof; or unless a demand and refusal to correct is alleged and proven.—*Alexander v. Caldwell*, 55 Ala. 517; *Campbell v. Hatchett*, 55 Ala. 548; *Berry v. Sowell*, 72 Ala. 14; *Berry v. Webb*, 77 Ala. 507; *Guilmartin v. Urquhart*, 82 Ala. 570, 1 So. Rep. 897; *Harold v. Weaver*, 72 Ala. 373; 1 Brick. Dig. 681, § 611.

T. SCOTT SAYRE, *contra*.—The application of a payment by the respondents to the open account having been made at the time of payment, without objection on the part of respondents, is binding; and the burden of proving the specific direction is upon the debtor making the payment.—*Levystein v. Whitman*, 59 Ala. 345.

HARALSON, J.—The primary object of the bill in this case is the foreclosure of a mortgage given on real

estate by appellants, who were defendants in the lower court, to appellees, the complainants there, to secure a note of the defendants to the complainants, for \$508.88.

This note and mortgage were due and unpaid, on the 2d February, 1891. The defendants were also indebted to complainants, on that date, for a balance on open accounts, in the sum of \$432.43. On that day, defendants paid to complainants the sum of \$432.43, the amount due and owing by them on their open account; and one of the employes of complainant, under the mistaken impression, as is averred, that it was the mortgage debt that had been satisfied, delivered to defendants the mortgage, but did not deliver to them the note, secured by it, which note, it is alleged, was lost or mislaid.

The appellants claim, that they paid their mortgage, and not the balance on their open account, and there is, therefore, no mortgage debt due, and no mortgage to foreclose, whereas, the complainants in the suit allege, it was the balance of the account that was paid, and the mortgage is still alive, unaffected by its delivery, through mistake to the defendants. There is no dispute as to the amount that was paid on the 2d of February, 1891, but the sole contention between the litigants is one of the application of the payment, whether to the mortgage or open account debt.

The prayer of the bill is to have the surrender and cancellation of said mortgage set aside, and for a foreclosure of the same. The chancellor granted the relief prayed, and this appeal is to reverse that decree.

The case is not one, nor is it similar to one, for the reformation of a written instrument for an alleged mistake in its execution, and the authorities referred to and the argument submitted by counsel in reference to such a case as analogous to this, are without application. The question here, as stated, is one purely of fact, as to the application of the payment of the money made by defendants to complainants. If the money was paid on the open account, and to close it up, and the mortgage was delivered up by mistake, when nothing had been paid on it, then its delivery to defendants did not affect it at all, and it remained in their hands, though marked cancelled by complainants, just as valid and of as much force and effect, as if it had remained in complainants hands. Defendants, in such case, would be held to be the depositaries of it, in trust for complainants.

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Let us enquire, then, about this payment. It must be admitted, that at the time of payment, the defendants had the right to direct its application ; but, if they failed to give any directions as to how it should be applied, the complainants had the right to apply it to either one of their debts, and if they did apply it, at the time, to their open account debt, both parties are bound by it. The burden of proving an alleged specific direction, as to the application of a payment, is upon the debtor. *Wheeler v. Stein v. Whitman*, 59 Ala. 345.

McD. Cain testified, that he was in charge of the books of complainant, temporarily, from the 26th of January, to the 4th of February, 1891, in the absence of J. Boyd, the regular bookkeeper ; that defendants came on the 2d of February, and asked for a statement of the account of Kent & Barnett, and each asked, also, a statement of his personal account ; that he, accordingly, furnished to them a statement of the open account of Kent & Barnett with complainants, and the account of T. R. Kent with them, and there being only two items on the account of R. A. Barnett, one, an item of debit, and the other, of credit, he furnished no written statement to him, but told him the balance that was to his credit. The witness attaches to his deposition, a copy of the account he rendered to defendants, which is headed, "Messrs. Kent & Barnett. In account with Messrs. Marks & Gayle." That account aggregated, on the debit side, \$3,645.46, composed altogether of cash advances, advanced at different times to them, and on the credit side, to \$3,213.03, the proceeds of 70 bales of cotton, except \$100, a cash payment on the 22d of January, 1891, leaving a balance of \$432.43 due by them to complainants, on the 2d of February, on open account ; and no reference to any mortgage indebtedness is found in the statement. He further testifies, that defendants settled with him by that statement of account, and paid that balance by drawing, each, a check on complainants, for the amount he had with them to his individual debit, and by paying him the balance, thereafter, of \$384, in cash ; that the checks drawn, respectively, by Kent and Barnett, were credited to their individual accounts, balancing them, and the amounts they paid, in their checks, and their cash payment, exactly aggregating the \$432.43, was credited to defendants in their

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said open account with complainants, to balance and settle the same in full; that they had the statement furnished to them, at the time they paid the balance of the account as shown; and there was no account of theirs of the mortgage transaction on the books of complainant.

W. M. Marks testified, that on the 2d February, he was cashier and general utility man of complainants, and remembered the transaction with defendants on that day; that nothing was said to him about their indebtedness to complainants, except that he was told, they had settled it and wanted their mortgage, and he did not remember whether this was told him by one of them or by some one in the office; that he did not investigate to see whether they had settled or not, but believing they had paid the mortgage and account, he surrendered the mortgage to them; that, as a matter of fact, defendants had not paid said note and mortgage; and, a few days afterwards, Mr. Boyd, the book-keeper, called his attention to that fact; that he afterwards saw defendants, and they acknowledged, that their mortgage debt was not paid, and stated that they were unable to pay the same then, but would make a new mortgage, any way complainants desired it; that complainants drew up another mortgage, giving them additional time for the payment of the amount claimed, and on May the 2d, complainants received a letter from defendants, in the handwriting of T. R. Kent, in which they said they had not signed the mortgage, and requesting them to fill out one for \$481.58, with instructions, and send to them, and they would sign—concluding with an apology for not attending to the matter sooner.

Another witness, W. A. Gayle, corroborates the witness Marks, as to these conversations with defendants testified to by him, and of their having promised to make a new mortgage for the old one, which they acknowledged had not been paid, and states, that the defendants came to Montgomery for the purpose of giving such a mortgage, but complainants desired their wives to join with them in its execution, and on that account it was not done, but they departed with the agreement, if complainants would send a Notary Public to their houses with the mortgage, they and their wives would execute it; and they requested this, to save their wives a trip to Montgomery.

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The defendants each testified in substance, that they went together, on the 2d February, to the office of complainants, and called for the balance on their mortgage account, and paid it, and the mortgage was delivered to them; that there was no statement of the account of Kent & Barnett with complainants rendered to them, at the time, but the balance due on the mortgage account was handed to them. They deny the conversations deposed to by witnesses, Gayle and Marks, for complainants, as to their acknowledging, that they had not paid the old mortgage, and agreeing to give another, but they say that they did promise to give a mortgage, if they found they owed anything, and the promise to do so was sometime after their first conversation with Gayle.

Kent states that he wrote the letter referred to to the complainants, but he gives no explanation of it, and Barnett states, that he knows nothing about it, and both say, the money was paid to be applied to "the mortgage account," as they repeatedly style the account, for which they called, and which they say they paid.

It will be thus seen, that the evidence for the parties, is in material conflict, reconcilable alone, as we prefer to consider it, on the score of the infirmity of human memory, when stimulated by self interest, and a desire which is very natural,—if it is not always commendable,—to succeed in the struggles of a law-suit. Here, as is generally the case, some foot prints have been left, which lead to a satisfactory solution of the vexing question between the parties, as to which their statements are at such variance.

Cain testified, that defendants, when they called asked for a "*statement of the account of Kent & Barnett,*" and defendants say, they asked for the statement of their "*mortgage account.*" Cain testified further, that he furnished them a statement of their account,—and not a statement of what was due on the mortgage,—showing, that they owed the complainants a balance of \$432.43 on open account; that they also called for their individual accounts; and he furnished them, showing that Kent had to his credit \$314.19, and Barnett to his, \$29.40, which balances they drew cheeks against to pay on the account rendered, which two sums, with \$88.84, which they paid in cash, exactly equalled the balance of \$432.43 and satisfied that open account. The defendants say

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they paid the mortgage account, and not the open account. Now, it appears, there was no such account on the books of complainants, as "the mortgage account," and it was unnecessary to have been there, as the mortgage and note, on which nothing is shown to have been paid, were a stated account, always of what was due, except the interest, and if any payments had been made on the note, they should, properly, have appeared endorsed thereon. Again, defendants paid the exact amount of the balance due on the open account, and not the amount due on the note and mortgage. They knew they had an open, unsecured, current open account with complainants, and they knew, that the amount of their mortgage indebtedness was \$508.88, with interest from Jan'y. 1, 1891, an amount larger than the sum they were paying. It was a fact, we must hold, they knew with absolute certainty, that \$432.43,—the amount they paid,—was not equal to their mortgage debt, and, therefore, could not pay it. It is true Kent testifies that he paid \$100 on the mortgage, in January; but that credit was applied to the open account, which was rendered to the defendants by Cain, and not disputed, leaving a balance of \$432.43, which they settled in the manner shown. If credited to the mortgage, and added to the indebtedness on the other account, the mortgage would have been \$408.88, and the balance, on open account, \$532.43 both making \$941.31, the same amount they owed on the day they paid the balance on open account; and yet they denied, after paying that sum, that they owed any thing more to complainants, either on open account or mortgage. Their memories are at fault. Besides, defendants say they called for their individual accounts, in addition to the mortgage account, and all three were furnished, Barnett being told, simply, what was due on his \$29.40. Kent attaches to his deposition his individual account, which Cain says he furnished him, showing a balance due him of \$314.19, but, he does not attach the "mortgage account," which he and Barnett both testify Cain furnished. Certainly, then, an account of Kent & Barnett was furnished by Cain. Both sides agree as to that, and they both agree, in the further fact, that \$432.43 was the balance of the account rendered, and the sum that was paid by defendants to settle the account, whatever it may have been. Cain attaches to his deposition, a

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copy of the account he swears he rendered, showing the balance defendants paid. Why did not defendants or one of them, attach to their deposition, the mortgage account which they say Cain furnished? What became of that account? If it had been the mortgage account that was rendered, as they say it was, and it showed a balance of \$432.43, which they admit they paid, and it had been produced, it would have been decisive of this case in their favor, for it would have shown that their recollection of the account rendered, and the amount due on it, was correct, and Cain's incorrect. We are not permitted to doubt, therefore, that the reason they did not attach "the mortgage account" to their depositions is, that they were mistaken, and no such account was in their hands, or ever had been. In this connection, too, a fact of very significant importance may be mentioned,—that after paying the \$432.43, the amount of their open account, the defendants, when Marks went to see them, and reminded them that the mortgage had been delivered up by mistake, told him, as they depose, that they had paid all they owed him, and were unwilling to admit that they owed him anything, and yet the evidence satisfactorily shows, they owed \$941.31 without interest, \$432.43 of which, only, they had paid. Their memories were not very accurate therefore. Another circumstance shows that their memories were uncertain. Denying when approached, as they say, that they owed anything, or had committed any mistake, Kent eventually became convinced they were mistaken as to having paid the balance due on the open account and agreed to give a new mortgage to secure it, and Barnett does not deny owing the balance of the unsecured account. On the 2d of May, Kent, as has been shown, in the name of Kent & Barnett, wrote to complainants agreeing to execute a new mortgage, if they would send one down by their young man, with instructions, and apologizing for not having attended to the matter sooner.

Our finding, after a careful consideration, is that the mortgage debt has never been paid; that defendants are mistaken in so supposing; that the mortgage was surrendered by mistake, and that the decree of the court below is free from error.

Affirmed.

[Prince & Blackman v. Bissinger.]

Prince & Blackman v. Bissinger.*Action for Damages for the Breach of a Contract.*

1. *New trial; excessive damages.*—In an action by contractors for refusing to permit them to perform the contract to build storehouses for defendants, at the gross price of \$4,500, where one of the plaintiffs, as a witness, estimated the cost to build at \$3,040, but omitted from his estimate certain items of cost to his firm, the propriety of including which was not questioned when testified to by an expert, who placed their cost at \$1,100, a judgment for the plaintiff in the sum of \$500 is excessive; and the court, on plaintiff's refusal to abate their judgment to the extent of \$150, properly grants a new trial, on motion of the defendant.

APPEAL from the Circuit Court of Dale.

Tried before the Hon. J. M. CARMICHAEL.

This action was brought by the appellants, Prince & Blackman, to recover from S. Bissinger, the defendant, for the breach of a contract entered into by the plaintiffs and the defendant; and was commenced by attachment. The facts of the case are sufficiently stated in the opinion. The appeal is prosecuted by the plaintiffs from a judgment of the circuit court granting a new trial on the motion of the defendant, on the grounds, among others, that the damages assessed by the verdict of the jury, and in the judgment rendered thereon, were excessive.

H. L. MARTIN and H. H. BLACKMAN, for appellants.

BORDERS & CARMICHAEL, *contra*.

McCLELLAN, J.—Prince & Blackman, on the theory that they had entered into a contract with Bissinger to build two certain storehouses in the town of Ozark for the gross sum of \$4,500, and that Bissinger had violated the contract and refused to allow them to perform their part of it, bring this suit to recover \$800 damages, which they claim would have been their net profits, had they been permitted to build the house according to the plans

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and specifications alleged to have been agreed upon. The jury returned a verdict for \$500 in favor of plaintiffs, and judgment was entered accordingly. On motion of defendant, the plaintiffs declining to abate their judgment to the extent of \$150, the judgment was set aside, and a new trial granted on the ground that the verdict was excessive. We think this action of the court was free from error. The witness for plaintiffs, Prince, one of them, omitted from his estimate of the cost to his firm of erecting the building several items which manifestly should have been included, and the propriety of including which was not questioned when they were deposed to by Tye, a disinterested and expert witness for the defendant. Without these items the aggregate of the estimated cost as testified by Prince was about \$3,040. The aggregate of these improperly omitted items was about \$1,100, which, added to the patently faulty estimate of Prince, made the total cost \$4,140. This sum deducted from the contract price of \$4,500 leaves a balance of \$360 only, instead of \$500, for which verdict was returned. To this conclusion the evidence was substantially without conflict. There was conflict in the evidence as to the amount of each item embodied in the estimate of Prince, but in the conclusion we have reached it has been assumed that the estimate of that witness, so far as it went, was correct. Whether that estimate or Tye's in respect of the items common to both was correct was a question for the jury, whose finding upon it should not be and has not been disturbed by the court.

The judgment of the court granting a new trial is affirmed.

Town of Luverne v. Shows.

Action of Assumpsit.

1. *Construction of a statute incorporating a town.*—An act of the general assembly incorporating a town, which declares that the corporate limits shall be "one mile each way, north, south, east and west from the court house square," as laid out by a land company, will be

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construed to fix the boundary lines of the corporate limits of said town to be almost a circle, with a radius of one mile, with its center at the court house square; and a place of business two hundred yards southwest from the court house square is within the corporate limits.

APPEAL from the Circuit Court of Crenshaw.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by the appellee, Thomas W. Shows, against the town of Luverne. The facts of the case are sufficiently stated in the opinion. The cause was tried without the intervention of a jury, and judgment was rendered for the plaintiff. The defendant now brings this appeal, and assigns as error the rendition of this judgment.

GAMBLE & BRICKEN, for appellants.—In the construction of a statute, the intention of the legislature must be taken into consideration, and a liberal interpretation, which would defeat the purposes of the statute will not be adopted, if any other reasonable construction can be adopted.—*Crosby v. Hawthorn*, 25 Ala. 221; *Brooks v. Mobile School Commissioners*, 31 Ala. 227; *Ryan v. Couch*, 66 Ala. 244; *Ex parte Plowman*, 53 Ala. 440; *Jones v. Drewry*, 72 Ala. 311; *Lehman v. Robinson*, 59 Ala. 219; *Ex parte Dunlap*, 71 Ala. 73; *Danzey v. State*, 68 Ala. 296; 2 Brick. Dig. 462, §§ 22, 33.

M. W. RUSHTON and I. H. PARKS, *contra*, cited *Grooms v. Hannon*, 59 Ala. 510; *Carlisle v. Godwin*, 68 Ala. 137; *Reese v. State*, 73 Ala. 18; *Lehman v. Robinson*, 59 Ala. 219; *Sykes v. Shows*, 74 Ala. 382; *Amos v. State*, 73 Ala. 501; *Cahaba v. Burnett*, 34 Ala. 408; *Maxwell v. Griswold*, 10 How. 242, and cases there cited; *Raisler v. M. & C. C. of Athens*, 66 Ala. 198; *Winter v. City Council*, 65 Ala. 403; *Welch v. Mayor*, 48 Ala. 291; *Wiley v. Parmer*, 14 Ala. 627; *P. & M. Ins. Co. v. Tunstall*, 72 Ala. 142; *King v. Martin*, 67 Ala. 177; 3 Brick. Dig. 51, § 10.

COLEMAN, J.—Thomas Shows having paid to the municipal corporation of the town of Luverne, under protest, five hundred dollars for a license to retail spirituous liquors, instituted the present action to recover back the money. Plaintiff contends that by a proper construction of the act of the legislature incorporating the town,

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his place of business was not within the corporate limits. We need not consider some of the difficulties in plaintiff's way if this were true, but will rest our decision upon the case made by him. Acts of 1890-91, p. 403, approved Feb. 6th, 1891, after incorporating the town of Luverne, declares that the corporate limits shall be "one mile each way, north, south, east and west from the court house square, as laid out by the Luverne Land Company, and recorded in the probate office of said county." "The court house square," from the map, seems to be a block 200 feet south and north by 100 feet east and west. The plaintiff's place of business was about two hundred yards southwest from the court house square.

According to plaintiff's contention the area incorporated consists of two strips of land 200 feet wide running east and west, and one hundred feet wide running north and south, crossing each other at right angles, including the court house square as the centre, and his place of business being in a southwestern direction from the square, he is neither west nor south, and consequently his place of business is not within the corporate limits. The argument is wholly untenable. Tested by a meridian line, he is west of the square, and by latitude he is south of the square. A further reading and construction of the act, in the light of facts, demonstrates more conclusively, if possible that there is no merit in the contention. At the time of the adoption of the act of the legislature, *supra*, incorporating the town of Luverne, the town was an existing municipal corporation, incorporated under the general laws of the State. Its boundaries at that time were "one-half mile each way from the court house, reserved as per the Luverne Land Co." survey or plat. The map or plat of the town as incorporated under the general laws, shows that plaintiff was included within the corporate limits as then incorporated. As a matter of course, "one half mile each way from the court house" would include plaintiff, whose place of business in the town, during the years 1889 and 1890, was only two hundred yards from the square, and had never been changed. The act of the legislature of 1890-91, *supra*, further provided that "*the present and future inhabitants of said town shall be and continue the body politic and corporate, under the name and style of The Town of*

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Luverne." Under the proof, the plaintiff and his place of business was expressly declared to be included in the "body politic and corporate of The Town of Luverne." Other provisions of the act manifest with equal clearness the legislative intent. Would not a fair interpretation of the act fix the boundary line of the corporate limits to be almost a circle, with its center at the "court house, as per the Luverne Land Company's survey or plat?"

The circuit court erred in rendering judgment for the plaintiff. A judgment will be here rendered for the defendant. The costs of appeal and of the trial court will be taxed against the plaintiff.

Reversed and rendered.

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Bill in Equity to enjoin Sale under a Mortgage, and to have Mortgage declared Void and Cancelled.

1. *Penal statutes; act regulating the doing of business by foreign corporations in this State.*—The act approved February 28, 1887, "to give force and effect to section 4, Article XIV of the constitution," which regulates the manner of conducting business in this State by foreign corporations, which prescribes the penalties for the violation of the fundamental law in reference thereto, and which provides means for the enforcing and collecting such penalties, is a penal statute under the law (Code, § 3705), and did not go into effect until thirty days after the adjournment of the General Assembly at which it was passed; the act itself not specifically providing for an earlier date for it to take effect.

2. *Mortgage to foreign corporations; when not controlled by act approved February 28, 1887.*—The act approved February 28, 1887, "to give force and effect to section 4, Article XIV of the constitution," is a penal law, and a mortgage executed by a resident of this State to a foreign corporation on March 1, 1887, being executed within thirty days after the adjournment of the General Assembly, at which said act was passed, is not governed by its provisions, and not being violative of any other statute, is a valid and binding contract between the parties.

3. *Bill to cancel mortgage; offer to do equity.*—Before a court of equity will grant relief on a bill filed to have a mortgage declared

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void and cancelled as violative of constitutional and statutory provisions, the complainant must offer to do equity by refunding the money he has received under the mortgage; but an offer in such a bill, that if the debt past due is "held valid in any event, complainant hereby offers and is able and willing and ready to pay the same," is not such an offer to do equity as the law requires.

4. *Same; requisites for foreclosure.*—Where a bill is filed by the mortgagor to have his mortgage declared void and cancelled, there can be no decree of foreclosure of said mortgage (in the absence of a cross-bill by the mortgagee, praying a foreclosure), unless the complainant in his bill offers to do equity, and submits himself to the authority and jurisdiction of the court; but an averment in the bill that, if "the court should ascertain that said mortgage is void, and should order a reference to the register to ascertain and report the amount due from the complainant to the respondent, he is ready and willing to pay the same," is neither such an offer to do equity, nor such a submission of the complainant to the authority and jurisdiction of the court as would justify a decree of foreclosure.

5. *Same; when decree of foreclosure erroneous.*—When, on a bill filed to have a mortgage executed on March 1, 1887, to a foreign corporation declared void and cancelled, as violative of section 4, Article XIV of the constitution and the act approved February 28, 1887, to give force and effect to this constitutional provision, there is no sufficient offer by complainant to do equity, or to submit himself to the authority and jurisdiction of the court, and the proof shows that the defendant has complied with the requirements of the said constitutional and statutory provisions, at the time of making the loan and taking the mortgage to secure it, a decree of foreclosure should not be rendered, but the bill, being without equity, should be dismissed.

APPEAL from the Chancery Court of Pike.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on May 2, 1891, by the appellant, C. E. Ross, against the New England Mortgage Security Co.; and prayed to have a threatened sale of the lands conveyed in a mortgage enjoined, and that the mortgage be declared void as violative of section 4, Article XIV of the constitution and the act approved February 28, 1887, to give force and effect to this constitutional provision.

The averments of the bill and its exhibits are sufficiently stated in the opinion. The respondent demurred to the bill on the following grounds: 1st. It contains no equity. 2d. The bill fails to allege that the respondent did not have a known place of business in said State, and an authorized agent therein at the time said mortgage was executed. 3d and 4th. Because the act ap-

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proved February 28, 1887, "to give force and effect to section 4, Article XIV of the constitution," is a penal statute, and was not in force at the date of the execution of said mortgage. 5th. Because the complainant does not offer in his bill to do equity, by offering to pay back to the respondent the money he had received from it under said mortgage. Upon the submission of the cause upon the demurrer, the chancellor overruled the 1st and 2d grounds of demurrer, and sustained the 3d, 4th and 5th grounds. The bill was subsequently amended, as shown by the opinion; and on the final submission of the cause, the chancellor, by a reference to the register, ascertained the debt due upon the mortgage, and decreed a foreclosure of said mortgage.

This appeal is prosecuted by the complainant, who assigns as error the interlocutory decree of the chancellor sustaining the several grounds of the respondent's demurrer, and the final decree foreclosing the mortgage.

M. N. CARLISLE, for the appellant.—The vital question in the present cause is whether the act approved February 28, 1887, was a penal statute. It is not a penal statute, and therefore the mortgage executed on March 1, 1887, was void as violative thereof.—*Taylor v. United States*, 3 How. 197; *Frohock v. Pattee*, 38 Me. 103; *Hathaway v. Johnson*, 5 N. Y. 93; *Short v. Hubbard*, 2 Bing. 355; 3 Met. (Mass.) 522; 13 Johnson, (N. Y.) 497; Endlich on Statutes, 322-3.

CALDWELL BRADSHAW and JAMES E. WEBB, *contra*.—The act approved February 28, 1887, was a penal statute, and did not take effect until thirty days after the adjournment of the legislature at which it was enacted.—Code of 1886, § 3705; *Armstrong v. Buford*, 51 Ala. 410; *People v. Nedrow*, 122 Ill. 363; *Gosselink v. Campbell*, 4 Clarke (Iowa) 300.

HARALSON, J.—I. The bill alleges that complainant, Ross, on the first day of March, 1887, jointly with his wife, executed and delivered a mortgage to the defendant, the appellee, on certain lands therein described, which mortgage is attached to the bill and made part thereof. It was given to secure a loan by defendant to complainant of \$7,200 that day made, for which com-

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nant executed his note to the defendant, payable on first of March, 1892, at the office of the Corbin Banking Company of New York, to which note were attached five coupon notes, for the accruing annual interest on said principal sum loaned, payable on the first day of December of each year, except the last, which was payable on 1st day of March, 1892, and the principal, were payable at said banking office in New York. By the terms of the mortgage, default should be made in the payment of either of the notes, at the option of the holder, the whole sum of money received became due and payable twenty days after such default, and the mortgage foreclosable.

Two of the interest coupon notes—the ones falling due on the 1st of December, 1889, and on the first of December, 1890—were not paid. More than twenty days after default in the payment of the last of said notes, the defendant was proceeding to foreclose said mortgage, according to its terms, by advertisement for a public sale of the lands therein described, when the complainant brought this bill to enjoin that sale, alleging that the mortgage was void, because it was made in violation of the act of the legislature of this State, passed on the 28th of February, 1887, entitled, "An act to give force and effect to section 4, Article XIV of the constitution of the State," forbidding foreign corporations to do business in this State, except on compliance with conditions prescribed in said act. The prayer was, that the mortgage be declared to be void and given up and cancelled, and general relief.

The offer in the bill to do equity is, "But if said interest notes past due are held valid in any event, complainant hereby offers, and is able and willing and ready to do the same." A demurrer was interposed to the bill, which was sustained on some of its grounds, when the complainant amended the bill, offering to do equity as follows: "Complainant avers, that if, upon the final trial of this cause, the court should ascertain that the mortgage is void, and should order a reference to the register to ascertain and report the amount due from the complainant to respondent, he is ready and willing and ready to pay the same." On a submission of the cause, the chancellor, by a reference, ascertained the debt, and entered a decree of foreclosure of said mortgage, to which this appeal is prosecuted.

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II. Penal laws are defined to be, those which prohibit an act, and impose a penalty for the commission of it.—2 Rapalje's Law Dic. 945; 2 Abb. Law Dic. 231; 18 Am. & Eng. Enc. of Law, 270. The statute approved February 28, 1887—Sess. Acts, 1886-87, p. 102—was intended, as declared in its caption, to give force and effect to section 4, Art. XIV of the constitution of the State. It was unlawful, before that act was passed, for a foreign corporation to engage in business in this State, "without having at least one known place of business, and an authorized agent or agents therein." That clause of the constitution was prohibitory, and it required no legislation to carry the mere prohibition into effect, or to give it force.—*Am. Un. Tel. Co. v. Western Un. Tel. Co.*, 67 Ala. 30; *Nelms v. Edinburgh Am. L. & M. Co.*, 92 Ala. 159, 9 So. Rep. 141. And section one of the act approved February 28, 1887, merely gives regulation as to the manner of conducting business in the State by foreign corporations, and did not make it any more unlawful to do business here, without complying with the requirements of the constitution, than before its enactment. The constitution did not prescribe any penalty for its own violation; but the statute comes along, and, in order to secure more certain compliance with the fundamental law, prescribes penalties for its violation. The second section provides, that whoever shall act as agent, or transact any business for any such corporation without having first complied with the provisions of the act, shall forfeit and pay to the State, for each offense, the sum of \$500; and section four provides a penalty of \$1,000 against the corporation, for doing business in the State without having complied with the terms of the act. It is further prescribed, that these penalties shall be sued for and recovered in the name of the State, by the solicitor of the circuit in which the offense was committed, and when collected, the money is to be paid into the treasury of the State, less the solicitor's fee; and, in case of the non-payment of such penalty, the party offending shall, on conviction, be imprisoned in the county jail, or sentenced to hard labor for the county, for a period not exceeding six months. It thus appears that said enactment is essentially a penal statute—*Dudley v. Collier & Pinckard*, 87 Ala. 431, 6 So. Rep. 304. In that case, which sustains the view of this statute we now

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it is singular enough, that the contract executed on the 8th March, 1887, succeeding the 28th February, the date the legislature adjourned, was declared illegal, although the thirty days, within which the statute, being penal, had to go into effect, had not elapsed. Section 3705 of the Code evidently escaped the attention of the attorneys engaged in the cause, and it did not occur to the learned judge delivering the opinion.

I. Section 3705 of the Code provides, that "no act shall take effect until thirty days after the adjournment of the General Assembly at which such act was passed, unless otherwise specifically provided in the act."

There was nothing in the act we are considering, directing when it should go into effect. The legislature adjourned on the 28th February, 1887, the day of the passage of said act. It follows, therefore, that it did not go into effect until thirty days after that date.—

Strong v. Bufford, 51 Ala. 410; *Olmstead v. Crook*, 89 Ala. 228, 7 So. Rep. 776. And, inasmuch as this mortgage was executed on the 1st day of March, 1887, within thirty days from the date of said enactment, and as it was so far as appears, in violation of that or any other provision, it must be held to be a valid and binding contract between the parties; and there was no error in sustaining the 3d and 4th grounds of demurrer to the bill.—

Freehold Land Mortgage Co. v. Sewell, 92 Ala. 170, 10 So. Rep. 143.

V. The 5th ground was also properly sustained. There was no offer to do equity by refunding the money which the complainant had received under the mortgage. He had no right to have a cancellation of this mortgage—as he sought—on the grounds of alleged illegality, in its having violated the provisions of said act without restoring or repaying all that he had received under the mortgage, principal and interest. His offer was less than this, and was not an offer to do equity.—*Freehold Land Mortgage Co. v. Sewell*, 92 Ala. 170, 10 So. Rep. 143; *New Eng. Mortgage Security Co. v. Sewell*, 97 Ala. 483; *Pomeroy's Eq.*, § 391; 2 Story's Eq., § 693-694.

VI. The 4th and 5th assignments of error question the decree of foreclosure rendered in the cause by the chancellor. Whether or not the court could have proceeded to a foreclosure of the mortgage under this bill,

[Simon & Son v. Johnson.]

filed by the mortgagor, depends upon the offer of complainant in his bill to do equity. The original bill, as we have seen, contained no sufficient offer, and the demurrer was properly sustained on that account. In the amendment to meet this defect no better offer was made. It is conditioned upon the court finding the mortgage to be void, (in which event there could not possibly be a foreclosure), makes no offer to pay, nor does the complainant submit himself to the authority and jurisdiction of the court. There was, however, no demurrer to the bill as thus amended. Yet in a bill filed by a mortgagor, there can be no decree of foreclosure of the mortgage—in the absence of a cross bill by the mortgagee praying a foreclosure—unless the complainant makes an offer in the bill to submit himself to the authority and jurisdiction of the court, so that the court, without more, may compel him to do equity.—*Br. Bank v. Strother*, 15 Ala. 60; *Rogers v. Torbut*, 58 Ala. 525; *Eslava v. Crompton*, 61 Ala. 514; *Garland v. Watson*, 74 Ala. 323.

A decree of foreclosure should not have been rendered in the cause, even if it was agreeable to the defendant for it to have been done. The bill was without any equity, and should have been dismissed. The proof showed that the defendant had complied with the requirements of the constitution, in having a known place of business and an authorized agent thereat in this State before and at the time of the loan of the money and taking the mortgage to secure it.—*Amer. Freehold Land Mortgage Co. v. Sewell*, *supra*.

Let a decree be here entered, reversing the decree of the chancery court, dissolving the injunction and dismissing the cause at the cost of the appellant both in the lower court and in this court.

Reversed and rendered.

101 328
105 344
108 242

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Action of Assumpsit.

1. Agency; authority of travelling salesman.—A travelling salesman, making contracts of sales of merchandise by sample, goods to be de-
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livered by the principal, and price to be paid on delivery, or on receipt of invoice, or upon the happening of some future event, has no implied authority to collect from the purchaser the money agreed to be paid, and the payment to such agent, without express authority, will not discharge the debtor from his liability to the principal.

2. *Same; custom and usage.*—The fact that in a town where goods were sold by a travelling salesman by sample, there prevails a custom for the merchants to pay said salesmen for the goods purchased, does not authorize or justify the payment to such travelling salesman, the agent of a non-resident firm, unless it is also shown that the principal had notice of such custom.

3. *Custom and usage; irrelevant evidence.*—In an action on a verified account, when it is shown that the account sued on had been paid to plaintiffs' travelling salesman, who sold the goods by sample, but had no authority to receive payment therefor, evidence that in a town where the sale was made it was a custom among the merchants to pay the travelling salesman for goods purchased, is not competent in the absence of other evidence tending to show that the principal had notice of such custom.

APPEAL from the Circuit Court of Geneva.

Tried before the Hon. J. M. CARMICHAEL.

This was an action of assumpsit, counting on the common counts, brought by the appellants, J. Simon & Son, against J. J. Johnson.

The plaintiffs introduced in evidence a verified account for goods sold by them to defendant. The defendant testified in his own behalf that he bought the goods specified in the verified statement of plaintiffs' account from one J. B. Carlisle, who was a drummer for plaintiffs; that he arranged with said Carlisle to discount said bill at 8 *per cent.* upon receipt of invoice, and it had been his, defendant's, custom, for 8 or 10 years, to pay drummers for goods bought from them; and it was the general custom of the merchants in Geneva to pay drummers the money for goods bought from them; that he had never bought but one bill before this one from the plaintiffs, but did not remember whether he paid the drummer or remitted direct to the plaintiffs; that he paid the present bill, less the discount, to the said Carlisle, and took Carlisle's receipt in full for the same, and wrote to the plaintiffs at once that he had paid the amount due them to said Carlisle, and that, according to his recollection, plaintiffs did not reply to said letter. The plaintiffs objected to the evidence of the custom of the merchants of Geneva, "unless he first proved that it was

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the custom of J. Simon & Son to allow their drummers to collect for goods sold in Geneva." The court overruled this objection, and the plaintiffs duly excepted. The plaintiffs further objected to said evidence on the ground that the time proven was not long enough to constitute a custom or usage. The court also overruled this objection, and plaintiffs duly excepted. In rebuttal the plaintiffs introduced testimony to the effect that, on the receipt of Johnson's letter, they immediately wrote him that Carlisle was not authorized to collect the amount due on said account, and that his receipt would not be recognized.

Upon the introduction of all the evidence the plaintiff requested, among other written charges, the following: "If the jury believe the evidence, they will find for the plaintiffs." The court refused to give this, as well as other charges requested by the plaintiffs, and to the refusal to give each of them the plaintiffs separately excepted. There was judgment for defendant. The plaintiffs appeal, and assign as error the several rulings of the trial court to which they reserved exceptions. It is not deemed necessary to set out in detail these several rulings.

J. J. MORRIS and W. D. ROBERTS, for appellants.

M. E. MILLIGAN, *contra*.

McCLELLAN, J.—The decided weight of authority, indeed well nigh all the adjudged cases, support the proposition that a travelling salesman of merchandise, making sales by sample on a credit or for cash to be paid on receipt of the goods or the invoice of them, has no implied authority to collect the money agreed to be paid from the purchaser.—2 Am. & Eng. Encyc. of Law, p. 355 and notes; *Kane & Co. v. Barstow*, 42 Kan. 465, s. c. 16 Amer. St. Rep. 490, and note 494; *McKindly v. Dunham*, 55 Wis. 515, s. c. 42 Am. Rep. 740; *Kohn v. Washer*, 64 Tex. 131, s. c. 53 Am. Rep. 745; *Butler v. Dorman*, 68 Mo. 298, s. c. 30 Am. Rep. 795; *Law v. Stokes*, 90 Am. Dec. 655; *Korneman v. Monaghan*, 24 Mich. 36; *Clark v. Smith*, 88 Ill. 298; *Higgins v. Moore*, 34 N. Y. 417; *Greenleaf v. Egan*, 30 Minn. 316; *Seiple v. Erwin*, 30 Pa. St. 513.

The particular facts of the Maine case, relied on by
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sel for appellee, prevent it from being an authority
just the proposition just stated. The opinion in that
indeed, recognizes the soundness of the rule declared
Giggins v. Moore and *McKindly v. Dunham*, *supra*, and
effect bases the conclusion that payment was well
to the agent mainly, if not entirely, on the facts
the "agent assumed to complete a contract of sale,
specific in terms, stipulating that payment was to be made
himself," and that, "after the goods had been delivered,
presented for payment a bill, made upon a genuine
head' of his principal." Neither of these facts is in
present case or was involved in the cases cited. With-
committing ourselves to the effect accorded them by
Maine court, it is readily conceivable that there is
reason for according them an important influence
in shaping the conclusion reached.—*Trainor v. Morison*,
100 Me. 160, s. c. 57 Am. Rep. 790. The Vermont case,
based on by the appellee, involved the sale by one Allen,
who was in fact a travelling salesman for plaintiff's firm,
who represented himself to be a member of the
partnership, and upon that representation made the con-
tract of sale with the defendants. This contract em-
braced a stipulation that defendants should pay Allen
the goods, when he should come to their city on his
trip, in about three months; and the decision is
based on this express stipulation for payment to Allen,
in connection with the consideration that defendants
had a right, under all the circumstances, to rely upon
Allen's making a truthful report of the terms of the
contract and to suppose that the goods were sent pursuant
to the contract as made; a view which finds nothing in
the present case to rest upon.—*Putnam v. French*, 53 Vt.
100, s. c. 38 Am. Rep. 682. The only case to which we
have been referred, or which our own investigation has
disclosed, that really sustains the position taken for ap-
pellee is that of *Collins & Co. v. Newton*, 7 Baxt. (Tenn.)
No great degree of investigation or consideration
is required by the opinion of the court, and in reaching
the conclusion announced no account seems to have
been taken of the distinction, undoubtedly very impor-
tant, between agents to make contracts of sale by sample to
be completed through a delivery of the goods by the principal,
and agents to whom payment is to be made on goods
being given for payment, or payment to be made on
delivery by the principal, and agents who, having

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the property of the principal *in their possession* for that purpose, *sell and presently deliver it to the purchaser*. The question has not been decided in Alabama. We are content, however, to follow the very numerous cases which hold that such an agent has no implied power to collect from purchasers for goods sold and delivered in the manner shown in this record. The agent has not the goods, and does not deliver them, *prima facie* his agency is discharged when he makes a contract of sale, and takes an order for delivery by the principal. The sole purpose of his itineracy is to induce parties, having need of the wares in which his principal deals, to buy them from the house he represents. In doing this he, in a sense, has taken the place of ordinary advertisement and orders through the mails to the wholesale dealer, which obtained in the course of such transactions before his day. Having done this in a given instance, at a particular place, and made report to his employer, he passes on, and it is the merest accident if he is again at that place at the time the bill falls due, or if the purchaser at such time knows his whereabouts. To hold that an agency simply to make and report such contracts of sale, under these circumstances, involves an agency to collect the contract price when the account matures, a matter wholly beyond the exigencies of commerce which brought these agencies into being, inconvenient of accomplishment and entirely unnecessary, in such sort that it is to be assumed that the principal held the agent out as empowered to collect, would be too radical a departure from elementary principles of the law of agency to be tolerated. To the contrary, we hold that a travelling salesman, making contracts of sale by sample, goods to be delivered by the principal and the purchase money to be paid on delivery, or at any other time transpiring, or upon any other event happening in the future, is, upon these facts and without more, wholly unauthorized to receive payment, and, of consequence, that payment made to him will not discharge the debtor from his liability to the principal.

It is insisted, however, in this case that the payment was authorized and justified by a custom prevailing generally in the town of Geneva, where the contract of sale was made, the goods delivered subsequently, and the price paid, also subsequently, to the agent, for payments

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to be made in this way. The plaintiffs, whom this agent was representing, lived and carried on their business in New Orleans. Conceding that the usage itself was established by the evidence, it did not authorize or justify the payment to the agent, or in any manner change or affect the rights of the principals, unless it had also been proved that they had notice of it.—(*German American Ins. Co. v. Commercial Fire Ins. Co.*, 95 Ala. 469, 11 So. Rep. 117. This was not only not proved, but there was no evidence adduced which legitimately tended to prove it. The only fact relied on as having such a tendency is, that some years previously the defendant had purchased a bill of goods from a firm in New Orleans, paid the bill at maturity to the travelling salesman who took the order, informed the firm of the fact, that they did not dissent from or object to this mode of payment, and that one member of that firm is now a member of the plaintiff firm. It is, we think, too clear for discussion that as proof of this one, isolated transaction would be no evidence of the alleged custom, so notice of it would be no evidence of notice of such custom.

Many of the rulings and instructions of the trial court are out of harmony with the law applicable to this case as we find it to be. We need not particularize them. The judgment must be reversed and the cause remanded; and if the evidence on another trial is the same we find in this record, it will be the duty of the court, upon request, to give the affirmative charge for the plaintiffs.

Reversed and remanded.

Smith et al. v. Boutwell et al.

Statutory Action of Ejectment.

1. *Homestead set apart to the widow; her estate therein.*—When a homestead, which does not exceed 160 acres and two thousand dollars in value, has been set apart to the widow as exempt under the act approved February 12, 1885, (Sess. Acts 1884-85, p. 114), she takes an absolute inheritable estate in such homestead.

2. *Proceedings to set apart homestead; objections can not be raised on collateral attack.*—In an action of ejectment, involving the widow's

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99	356
101	373
103	617
101	373
115	347
115	591
101	373
119	417
101	373
123	545
124	301

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title to the homestead, an objection that the record of the proceedings to set apart the homestead to the widow did not show affirmatively that the commissioners appointed were "citizens of good standing," can not be raised.

3. *Constitutionality of statute regulating descents and succession to property.*—The act approved February 12, 1885, (Sess. Acts 1884-85, p. 114), which provides for the setting apart of the homestead exemption to the widow, and defines her estate therein, is constitutional, since "each State has the right to enact laws for the regulation of descents and succession to property within its limits."

APPEAL from the Circuit Court of Coffee.

Tried before the Hon. J. M. CARMICHAEL.

This was a statutory action of ejectment, brought by Calvin Boutwell and others, against the appellants; and sought to recover certain described property.

The cause was tried upon an agreed statement of facts, the substance of which is sufficiently stated in the opinion. The court, at the request of the plaintiffs, gave the general affirmative charge in their behalf, to the giving of which the defendants duly excepted. There was judgment for the plaintiffs. The defendants appeal, and assign as error the giving of the general affirmative charge requested by the plaintiffs.

ROBERTS & MARTIN, for appellants.—The law in force at the time of setting apart the exemptions to the widow vested in her the title to the homestead as completely and fully, as if the estate had been administered upon and declared insolvent by the probate court.—*Munchus v. Harris*, 69 Ala. 509; *Hartsfield v. Harroley*, 71 Ala. 231; *Baker v. Keith*, 72 Ala. 121; *Dossey v. Pitman*, 81 Ala. 381, 2 So. Rep. 443; *Miller v. Marks*, 55 Ala. 322.

J. D. GARDNER, *contra*.—The record of the proceedings of the probate court to set apart the homestead exemption, does not show that the commissioners were citizens of good standing in the county; and, therefore, the proceeding did not vest the title in the widow.—*Willburn v. McCalley*, 63 Ala. 444; *Wyatt v. Rambo*, 29 Ala. 510; *Johnson v. Eureka*, 12 Nev. 28.

COLEMAN, J.—Plaintiffs, heirs of John Boutwell, deceased, instituted the statutory action of ejectment against defendants, grantees and heirs of Martha Boutwell.

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well, who was the widow of John Boutwell. The suit was commenced after the death of Martha Boutwell. There is but one material question in the case. The land in question was the homestead of John Boutwell at the time of his death, who died February 15th, 1887, leaving no minor children, and the entire tract did not exceed in area one hundred and sixty acres, and was of less value than two thousand dollars. There was no administration upon his estate. Under the statute in force at the time of his death (Acts of 1884-85, p. 114), the widow, Martha Boutwell, filed her application to have her exemption set apart. The petition for this purpose seems to be regular, and the proceedings conformed to the statute. The lands in question were regularly set apart to her, and the allotment confirmed and approved by the court.

The simple question is whether the widow took a fee in the land. It will be noticed that the right of the widow to the exemption vested, under the acts of 1884-85, before the adoption of the Code of 1886.—Code, § 2543. Under the law, as it was in force under the Code of 1876, sections 2827, 2841, and as now in force under section 2543 of the Code of 1886, an exemption of homestead set apart to the widow and minor child, or either, did not vest the fee in the widow or minor child, unless the estate was insolvent; and we held, it required a judicial ascertainment and declaration of insolvency, before the fee passed.

The act of 1884-85, p. 114, under which the widow took her estate, in section 2, has this provision: "Upon the confirmation and approval of such report [that of the commissioners] by the probate judge, all the title, rights, privileges and immunities to such property shall vest in such widow, or such widow and minor child, or children, or minor child or children, as completely and fully as if said estate had been regularly administered upon and declared insolvent." This act of the legislature was intended to, and did materially, alter the law and enlarge the estate of the widow and minor child, or minor children. Prior to its enactment, it was necessary that the estate be judicially declared insolvent, before an absolute estate passed to the widow, or minor child. Under the act of 1884-85, if the homestead did not exceed 160 acres and \$2,000 in value, by proper proceedings,

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the estate vested absolutely, whether solvent or insolvent. The statute is without doubt constitutional, as "each State has the right to enact laws for the regulation of descents and succession to property within its limits." *Ethridge v. Malempu*, 18 Ala. 565.

It is contended that the statute requires that the commissioners "shall be citizens of good standing," and the record proceedings fail to show affirmatively, that the commissioners selected possessed these statutory qualifications. If the point possessed merit, this question could not be raised on collateral attack. The court had jurisdiction by virtue of the widow's application, in which every jurisdictional fact is set out. The appointment of the commissioners was regularly made, their report is full and in regular form, and the decree of the court, approving and confirming the report, is sufficient in all respects. We are of opinion that the widow took an absolute, inheritable estate in the lands.

The court erred in giving the affirmative charge for the plaintiffs. Upon the agreed facts, the defendants were entitled to the affirmative charge.

Reversed and remanded.

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161	376
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Action against a Railroad Company for Personal Injuries.

1. *Averments of negligence in a complaint.*—In an action against a railroad company to recover damages for personal injuries, inflicted by a mule driven by the plaintiff becoming frightened at the approach of one of defendant's trains, a complaint which alleges "that the mule became frightened at said engine and cars owing to the negligence of defendant's employes in the running and management of said engine and cars," contains a sufficient averment of negligence, and is not demurrable.

2. *Escape of steam from railroad engine no cause of action.*—Where steam is necessarily allowed to escape from a railroad engine, in order to slacken the speed of the train, for the purpose of turning a sharp curve in the track, the company is not liable for injuries occasioned by a mule, driven on a public road running parallel to the railroad track, becoming frightened at the noise of the escaping steam and running away, provided the escape of steam was not more than was

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and such as was necessarily incident to the control of the engine at that time, and was not recklessly or wantonly caused by the negligence of the railroad company.

APPEAL from the City Court of Anniston.

Decided before the Hon. B. F. CASSADY.

This was an action brought by William Stedham against the Oxford Lake Line, to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the defendant's employes.

The allegations of negligence, as contained in the first count of the complaint, are as follows: "That on the day of August, 1891, plaintiff was riding from Oxford eastward in a buggy, drawn by a mule hitched to it, along the public highway in the town of Oxford, about one-quarter of a mile east of the business block of Oxford, where the public highway and the Oxford Lake Line run side by side, when he (the plaintiff) was overtaken by the engine and cars running on said line, and just as they were almost even with, or in seven or eight yards of plaintiff, the engineer thereof, with gross carelessness and negligence, unnecessarily caused the engine to escape from the engine, the sight and noise of which frightened said mule, and caused him to run away with the buggy, and plaintiff was thereby thrown from said buggy, and greatly injured: that his collar was badly injured, his right arm partly paralyzed, his spine injured;" for which injuries plaintiff brings said suit.

The allegations of negligence as contained in the 6th count, after setting up the fact of the defendant's mule becoming frightened and running away, are as follows: "That the mule became frightened at said engine and owing to the negligence of the defendant's employes in the running and management of said engine and cars, the great damage of the plaintiff as aforesaid," &c. The grounds of the demurrer to this last count of the complaint are substantially as follows: 1st. That it does not sufficiently appear that plaintiff was injured by reason of defendant's negligence. 2d. That the defendant is not liable for the fright plaintiff's mule caused by the escape and running of its cars. 3d. That the defendant's negligence as alleged in the said sixth count is too remote. These demurrers were overruled.

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The facts and circumstances of the accident are sufficiently stated in the opinion. Upon the introduction of all the evidence the court, at the request of the plaintiff, gave several charges, to the giving of each of which the defendant separately excepted, but it is not deemed necessary to set them out in detail. The defendant requested, among others, the following written charge, and separately excepted to its refusal: "If the jury believe the evidence, they must find for the defendant."

There was judgment for the plaintiff. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

J. J. WILLETT, for appellant.

JOHN F. METHVIN and KELLY & SMITH, *contra*.

HARALSON, J.—There were originally five counts in the complaint, to which, by amendment, a sixth was added. The defendant demurred to each count, but before the demurrer was passed on, the plaintiff amended his complaint by striking out all the counts except the 1st and 6th, the demurrers to which were overruled, and defendant took issue on them. In the written agreement of appellant's counsel filed in the cause, it is admitted that the first count is a good one, and the assignment of error based on its overruling is waived. The averments of negligence in the 6th count are such as have many times been held to be sufficient.—*S. & N. A. R. R. Co. v. Thompson*, 62 Ala. 500; *Western R. R. Co. v. Lazarus*, 88 Ala. 453, 6 So. Rep. 877; *E. T. V. & G. R. R. Co. v. Watson*, 90 Ala. 41, 7 So. Rep. 813; *Stanton v. L. & N. R. R. Co.*, 91 Ala. 382, 8 So. Rep. 798; *Ensley R. R. Co. v. Chewning*, 93 Ala. 24, 9 So. Rep. 458.

The principles upon which this case rests have been well settled. It is laid down by Pierce, in his work on Railroads, that "The authority to operate a railroad includes the right to make the noises incident to the movement and working of its engines, as in the escape of steam and rattling of cars; and also the right to give the usual and proper admonitions of danger, as in the sounding of whistles and the ringing of bells. It is, therefore, not liable, while exercising its right in a lawful and reasonable manner, for injuries occasioned by horses, when

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being driven upon the highway, taking fright at such noises. But, if the injury resulting from the fright would not have happened, but for a breach of duty by the company, it will be liable for the injury."—Pierce on Railroads, 348. Rorer states the principles to the same effect, and adds: "But if the acts of the servants occasioning the fright are wanton and malicious, and be done in the discharge of their business by using the appliances of the company, such as wanton whistling of the engine, and the reckless discharge of steam, the company will be liable."—Rorer on Railroads, 704 (12).

In *Phil. W. & B. R. R. Co. v. Stinger*, 78 Pa. St. 225, in a case similar to this, it is said: "It may be safely assumed, that the company is not liable for injuries resulting from the use of its cars, where due care is exercised. The noise of a rapidly moving train, as well as the sound of the whistle, may alarm a horse, and cause an accident; whether such accident imposes a liability upon the company to make compensation in damages, must depend, to a great extent, upon the fact, whether it was the result of a want of proper care on the part of the persons in charge of such train." In that case, the fright and running away of the horse and the consequent injury to the plaintiff, was alleged to have been occasioned by the unnecessary and improper blowing of the whistle of the engine, and it was held, that the mere fact of the whistling furnished no presumption of negligence, inasmuch as the whistle was in general use on all roads operated by steam, and was necessary and proper to be used; but whether or not it was used in such an improper, reckless or wanton manner as to amount to negligence, was a subject of legitimate inquiry, to be submitted under all the facts of the case to the jury.

In *Stanton v. L. & N. R. R. Co.*, *supra*, the foregoing principles received approbation at our hands, and it was further held that, "as the railroad corporation has the right to use its track, and make the required signals at a public crossing, and all the usual noises incident to the running and moving of its trains, it was incumbent on the plaintiff to show the blowing off of steam and the making of the noise complained of were unnecessary, and recklessly or wantonly done, or with the intention to frighten the mare."

The evidence in this cause showed, without contradiction, that the plaintiff, at the time he was injured, was riding in a buggy with another party, drawn by a mule, returning home from the town of Oxford; that the mule was a gentle one, had never run away before, but would some times shy or dodge; that the public highway he was travelling ran parallel with a street in said town, along which the defendant's railroad ran, but how far apart is not shown, further than that at the point of the accident the track came within about thirty feet of the public road the defendant was travelling, and at that point, it turned by a sharp curve to the right, and ran away from said road; that the engine of the defendant's train was under the management of a skillful and competent engineer; that as the train was approaching said curve, it was running about six miles an hour, and steam was being blown off under the engine, at which plaintiff's mule took fright, ran off, threw him out of the buggy and injured him. The evidence on the part of the defendant showed, that it was the invariable custom of the engineer, in approaching said curve, to let off steam to slow up in making the curve; that he did not allow any more steam to escape than was necessary or customary. And the engineer swore, he had no idea or thought of frightening plaintiff's mule. There is nothing in the plaintiff's evidence to contradict that offered by defendant, or at variance with it, unless it be a statement by one Brown, examined by the plaintiff. He was an engineer, and the statement to which we refer is, "that witness had been on the car going to Oxford Lake many times, and did not know any place where it was necessary to let off steam." This statement was, in effect, that the witness did not know of or remember the curve in this railroad, at the time he testified. He says nothing about the curve in his testimony, and the other undisputed evidence in the cause shows it was a very sharp one. The engineer states in reference to it, "That said curve, near which the accident occurred, was and is a very sharp curve, and persons could not be seen on the track ahead, until said curve had been entered." It was his duty to slow up and make that turn in the track with great caution. As we said, in a recent case touching this matter, we may here repeat, that in running a train where a curve is to be turned, and where the view is ob-

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structed, "the sharper the curve the greater the care with which trains as to their speed should be operated, to prevent the liability to encounter obstacles hidden by reason of the curve. Where any thing suggests care to avoid peril and danger to others, the higher the duty increases to observe it."—*Birmingham Min. R. R. Co. v. Harris*, 98 Ala. 326. So, there is nothing in the evidence of this witness to dispute or set aside the other undisputed evidence in the cause,—that the train of defendant was being operated at the time by a careful engineer, in a prudent manner, and with no more noise or escape of steam than was usual and necessarily incident to its movement. The plaintiff's injury arose from no negligence of the defendant's employes, and was an accident for which defendant is in no way responsible.

The general charge, as requested by defendant, should have been given.

Reversed and remanded.

Town of Avondale v. McFarland et al.

Action for damages.

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116	66
116	562
101	381
132	561
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134	228

1. *Liability of municipality for damages for changing grade of streets.*—Under the constitutional provisions now of force, (Const. Art. XIV, § 7), a municipal corporation is liable in damages for injuries caused to property abutting on a street, by so changing the grade of said street as to prevent the natural flow of the water from said adjacent property. (*City Council v. Townsend*, 80 Ala. 489, s. c. 84 Ala. 472 overruled to this extent.)

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. JAMES B. HEAD.

This was an action brought by the appellee against the town of Avondale, to recover damages for injuries caused to property of the plaintiffs by the defendant changing the grade of one of its streets, on which the property of the plaintiffs abutted. The facts of the case are sufficiently stated in the opinion.

In accordance with the verdict of the jury, there was judgment for the plaintiffs. The defendant appeals, and

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assigns as error the several rulings of the court, to which exceptions were reserved. It is deemed unnecessary to set out these several rulings in detail.

M. A. MASON, for appellant, cited *City Council v. Townsend*, 80 Ala. 489, 2 So. Rep. 155; *City Council v. Townsend*, 84 Ala. 472, 4 So. Rep. 780.

W. F. DICKINSON, *contra*, cited *City Council v. Maddox*, 89 Ala. 181, 7 So. Rep. 433; *Oakley v. Trustees*, 6 Paige 262; *City of Delphi v. Evans*, 36 Ind. 90, 10 Amer. Rep. 12 and note; *Louisville v. Mill Co.*, 3 Bush 416; *Goodall v. Milwaukee*, 5 Wis. 32 and note.

STONE, C. J.—The transcript before us shows without material conflict, as we think, the following state of facts:

The town of Avondale was laid off into lots, with places for streets marked off. One of the streets passed over low, wet ground; so low and wet, that to fit it for travel as a highway, and render it convenient and safe for use as a street, it was necessary to fill in and raise its grade. Adjoining this unimproved street was a lot which corresponded in grade with the street in its natural, unimproved stage. Plaintiffs below—appellees here—purchased this lot, and erected upon it a dwelling, which was occupied by one or more of them. After this, the town authorities filled in and raised the grade of the street, so as to make it safe and convenient as a highway. The effect of thus raising the grade of the street was to check the natural flow of water from plaintiff's lot, and cause it to stand upon it six or eight inches in depth. It is not claimed that this work was done unskillfully or carelessly, but it is complained that no escape or outlet was provided, by which the water could flow off. On the other hand the town authorities made proof tending to show that it was not practicable to provide an escape or outlet for the water, except across other lots that were private property.

We propose to consider only a single question, namely: Whether in laying off lots and streets, dedicating the latter and selling the former, it is part and parcel of the implications of the contract of sale, that the corporate authorities shall have the right and power to so change

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and improve the streets, as to make them safe and convenient highways for the public; and this, without being required to make compensation to the lot-owner for the injury done his property.

Section 7, Article XIV of the Constitution of 1875 ordains that "Municipal and other corporations, and individuals vested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured or destroyed by the construction or enlargement of its works, highways, or improvements." In *City Council of Montgomery v. Townsend*, 80 Ala. 489, 2 So. Rep. 155, s. c., 84 Ala. 478, 4 So. Rep. 780, the foregoing question was answered by this court in the affirmative. In the later case of *Same v. Maddox*, 89 Ala. 181, the court was equally divided on the forgoing inquiry, leaving it undecided. If the duty and liability to make good the damage done is in all cases absolute, without regard to the conditions hypothesized above, then the rulings of the circuit court in this case are free from error. On the other hand, if the rulings in *Townsend's Case* are followed, the judgment of the circuit court must be reversed; for the rulings are not reconcilable with those cases.

The majority of the court concurs in, and adopts the opinion of Justice Somerville as pronounced in *City Council v. Maddox*, 89 Ala. 181, 7 So. Rep. 433; and as the principles of that opinion were given effect to in the trial of this case in the circuit court, the result is an affirmation of this case. The decision in the *Townsend Cases*, 80th and 84th Alabama, is overruled, to the extent it conflicts with this opinion.

Affirmed.

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Bill in Equity to set aside a Conveyance as fraudulent.

1. *Conveyance of stock of goods, absolute in form, but intended as a mortgage.*—A conveyance of his entire stock of goods by a debtor

101	883
120	236
121	88
121	111
121	270
101	883
128	136
128	138
101	883
129	379
101	883
132	79
132	94

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to one of his creditors, in form an absolute sale, but intended only as a mortgage or as a security for an indebtedness, the debtor being permitted to remain in possession, to carry on the business, and to sell the property in regular course of trade for his own benefit, is made in trust for his own use, and is, therefore, under the provision of the statute (Code, § 1730), fraudulent and void as against subsequent, as well as existing creditors.

2. *Bill to set aside fraudulent conveyance; joinder of existing and subsequent creditors.*—Where a transfer by a debtor to one of his creditors, in form an absolute sale, but intended as a security for an indebtedness, is void under section 1730 of the Code, as being made for the use of the debtor executing the conveyance, existing and subsequent creditors may join in a bill seeking to set aside such conveyance as fraudulent and void.

3. *Suit in equity against a partnership; married woman being a partner no defense to a bill, and does not invalidate a contract made by the firm.*—Where the sole purpose of a bill, filed to cancel as fraudulent a conveyance by a partnership, is to subject to the satisfaction of complainants' demand the assets of said partnership, it is no objection to said bill that one of the partners is a married woman, nor does such a fact destroy the binding obligation of the contracts by which the firm became indebted to the complainants.

4. *Bill to set aside fraudulent conveyance; not demurrable for failure to aver that defendants were not licensed to sell liquors, which form part of consideration of complainants' debt.*—A bill filed by creditors seeking to set aside as fraudulent and void a conveyance by their debtor to other creditors, which avers that a part of the consideration of the debt sought to be enforced was spirituous, vinous or malt liquors, is not subject to demurrer because it fails to aver that the complainants were licensed to make said sales; the *prima facie* presumption of the law being that they had complied with the revenue statutes, and taken out the required license.

5. *Same; when not necessary to aver insolvency of debtor.*—When a bill is filed by creditors to set aside a conveyance of their debtor to other creditors as fraudulent and void under the provisions of section 1730 of the Code, it is not necessary to aver the insolvency of the debtor, since the creditor has a right to pursue and subject the property conveyed by his debtor to the latter's own use and benefit, notwithstanding the debtor may have other property which might be subject to said debt.

APPEAL from the City Court of Birmingham, in Equity.
Heard before the Hon. H. A. SHARPE.

The bill in this case was filed by the Birmingham Brewing Company and Solomon & Levi, against a partnership under the name and style of Patrick A'Hern, against Bridget O'Neil and Patrick A'Hern, individu-

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, and against J. Fox's Sons; and prayed to have set
le as fraudulent and void a certain conveyance of the
perty of said partnership, made to J. Fox's Sons on
e 17, 1891, in alleged payment of an alleged indebt-
ness.

The bill averred that the respondents, Bridget O'Neil,
married woman, and Patrick A'Hern, her son-in-law,
r leasing from the Elyton Land Co. a certain lot,
cted thereon a two story frame building, which they
upied as a saloon and boarding house; that said
on business and said boarding house business were
and managed together by the said Patrick A'Hern
l Bridget O'Neil, as partners, under the firm name of
rick A'Hern; that said Bridget O'Neil managed the
rding house and Patrick A'Hern the saloon business;
t on April 17, 1891, the respondents, J. Fox's Sons,
uced the Birmingham Brewing Co. and Solomon &
ri to extend a certain line of credit to the partnership
Patrick A'Hern, representing that said partnership
s entirely worthy of credit; that the complainants,
on the faith of said representations, sold the said re-
spondents, Bridget O'Neil and Patrick A'Hern, certain
ods, wares and merchandise, for which they are still in-
oted to the complainants; and that on June 17, 1891,
respondents, Bridget O'Neil and Patrick A'Hern,
veyed to J. Fox's Sons, in alleged payment of an
ged debt of \$3,827, the property owned by the firm
Patrick A'Hern, which was, at the date of the said
veyance, reasonably worth \$6,000. The bill further
ged that after said conveyance to said J. Fox's Sons,
said respondents, Bridget O'Neil and Patrick A'Hern,
re allowed to remain in possession of the property
veyed, carrying on the business, buying and selling
ods, in all respects as they had done previous to the ex-
tution of said conveyance, as if the business was their
n, until on or about the 13th of July, 1891, when respon-
at Patrick A'Hern absconded from the State, at which
e said J. Fox's Sons, but not until then, took posses-
n of the property conveyed, and were, at the time of
filing of the bill, in possession of said property. The
further alleged that the conveyance from the part-
rship of Patrick A'Hern to J. Fox's Sons was not
at it purported to be on its face, but was only intended
a security for some indebtedness of said partnership

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to J. Fox's Sons. The bill also alleged that with the exception of two items the indebtedness of Patrick A'Hern and Bridget O'Neil, partners, to Solomon & Levi was contracted prior to said alleged conveyance to J. Fox's Sons; but that the indebtedness to the Birmingham Brewing Company was contracted subsequent to said alleged sale. The bill as amended did not seek any personal decree against Bridget O'Neil.

The respondents demurred to the bill, and assigned, among others, the following grounds of the demurrer: 1st. That said bill of complaint shows on its face that the said Bridget O'Neil is a married woman, the wife of Thomas O'Neil, and was such married woman at the time of the making of the alleged debts in said bill, and does not show any facts which make the debts binding or obligatory upon the said Bridget O'Neil. 2d. Because the said bill does not show that the husband of the said Bridget O'Neil consented for her to contract said debts, or create said obligations, and that he expressed such consent in writing. 3d. Because the said bill seeks to subject property formerly owned by said Bridget O'Neil to the payment of complainants' debt, but does not allege any facts which show that the alleged indebtedness of the said Bridget O'Neil was binding on the said Bridget O'Neil, or that the husband had given his consent for the said Bridget O'Neil to create said debt or obligation, and expressed his assent in writing, and does not show any other facts which make the said debt obligatory or binding upon the said Bridget O'Neil. 4th. The said Bridget O'Neil is shown to have been a married woman at the time she is charged with entering into the partnership of Patrick A'Hern; and it is further shown that part of the business to be engaged in by said firm of Patrick A'Hern, was to retail spirituous, vinous and malt liquors in the city of Birmingham, Ala., when the said Bridget O'Neil had no power or capacity to engage in or carry on such business. 5th. To that part of complainants' bill which seeks to hold the said Bridget O'Neil, or the property of said O'Neil, or the partnership property of Patrick A'Hern liable for the debt created by the firm of Patrick A'Hern, which was so contracted by said firm while engaged in the business of retailing spirituous, vinous and malt liquors in the city of Birmingham, Ala., because the said Bridget O'Neil had no capacity to enter

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into or engage in said business. 7th. To that part of the bill that seeks to discover on account of the indebtedness to the Birmingham Brewing Company, because said bill shows that the indebtedness was created subsequent to the date of the filing of said conveyance, because there are no facts averred in said bill which show that the said conveyance was fraudulent or void as to the Birmingham Brewing Company. 8th. Because the bill does not show which part of said alleged indebtedness was contracted for the boarding house business and which part was contracted for the retail liquor business. 9th. That the bill does not show that the demands sought to be enforced by the complainants have been reduced to judgment. 10th. Because the bill is without equity. 11th. Because the bill is multifarious, in that it joins as parties complainant, the Birmingham Brewing Company and Solomon & Levi, each claiming a separate and distinct cause of action.

Upon the submission of this cause on the demurrers, the chancellor overruled each ground thereof, and his decree in so doing is here assigned as error.

LANE & WHITE and T. B. and R. P. WETMORE, for appellants.—1. Bridget O'Neil being a married woman, as shown by the bill of complaint, did not have the capacity to enter into the partnership of Patrick A'Hern. Code of 1886, §§ 1390-20. 2. The complainants aver in their bill that the consideration of part of their debts was for spiritous, vinous or malt liquors, but there is no averment in said bill that they had obtained the license authorizing said sale. The sales were, therefore, void. *Am. Un. Tel. Co. v. West. Un. Tel. Co.*, 67 Ala. 26; *Beard v. Un. & Amer. Pub. Co.*, 71 Ala. 60; *Farrior v. New Eng. Mortg. Sec. Co.*, 88 Ala. 275, 7 So. Rep. 200; *Mullens v. Amer. Freehold Land Mortg. Co.*, *Ib.* 280, 7 So. Rep. 201; Code of 1886, § 1323. 3. The defendant, Bridget O'Neil, had no power to enter into said partnership and its debts are not binding upon her.—Code of 1886, §§ 2346, 2350. 4. The complainants being simple contract creditors, one being an existing and the other a subsequent creditor, can not properly be joined as parties complainant. *Tower Manfg. Co. v. Thompson*, 90 Ala. 129, 7 So. Rep. 530; *M. & F. Railway Co. v. McKenzie*, 85 Ala. 546, 5 So. Rep. 322; 3 Brick. Dig. 515, § 119, cases cited. 5. The

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bill of complaint is without equity, because it does not aver the insolvency of the partnership of Patrick A'Hern, or that it has not ample means, outside of the property sold to J. Fox's Sons, sufficient to pay the debts of complainants and the other creditors.—4 Amer. & Eng. Encyc. of Law 575 and note.

MOUNTJOY & TOMLINSON, *contra*.—1. The conveyance by the partnership of Patrick A'Hern to J. Fox's Sons, was within the provisions of Section 1730 of the Code of 1886, and was, therefore, fraudulent and void as against both existing and subsequent creditors.—*McDermott v. Eborn*, 90 Ala. 258, 7 So. Rep. 751. 2. The partnership, under the firm name of Patrick A'Hern, had capacity to contract with complainants though a member of the partnership was a married woman.—*LeGrand v. Eufaula Nat. Bank*, 81 Ala. 123, 1 So. Rep. 460. 3. Two or more simple contract creditors may join as complainants in a bill to set aside, on the ground of fraud, a conveyance executed by their common debtor.—*Gibson v. Troubridge Furniture Co.*, 93 Ala. 579, 9 So. Rep. 370.

McCLELLAN, J.—“All deeds of gift, all conveyances, transfers and assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, are void against creditors, existing or subsequent, of such person.”—Code, § 1730.

A mortgage of merchandise and the like by a debtor to his creditor to secure the indebtedness, or a formal sale intended to operate only as a security for the indebtedness, is a transfer for the use of the person executing the mortgage or bill of sale within the section quoted, and void as against both existing and subsequent creditors where the mortgagor or seller is, by the terms of the writing or extraneous understanding of the parties, expressed or implied, permitted to remain in possession of the property and sell the same in the regular course of trade for his own benefit.—*Benedict v. Renfro*, 75 Ala. 121; *Murray v. McNealy*, 86 Ala. 234, 5 So. Rep. 565; *McDermott v. Eborn*, 90 Ala. 258, 7 So. Rep. 751.

The present bill makes a case within this statute as construed in the cases cited. The transfer of the property being void alike as against antecedent and subsequent creditors, all simple contract creditors, whether prior or

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subsequent, have equal rights and the same remedies in respect of subjecting it to the satisfaction of their demands; and upon the same principle that prior creditors may unite in a bill attacking a sale by the debtor, which is fraudulent and void only as against debts existing at the time of the transaction, both classes of creditors may join in an assault upon a transaction of this sort, which is void as against the claims of each.

The bill as amended does not seek relief against Ridget O'Neil individually. Its sole purpose so far as he is concerned is to subject to the satisfaction of complainants' demands the assets of the partnership, doing business under the name of Patrick A'Hern, and composed, as is alleged, of said A'Hern and Mrs. O'Neil. There is no objection to such a bill that one of the partners is a married woman, nor does that fact constitute an infirmity in the binding obligation of the contracts by which the firm became indebted to the complainants.—*Grand v. National Bank*, 81 Ala. 123, 1 So. Rep. 460; *Red Lumber Co. v. Lewis*, 94 Ala. 626, 10 So. Rep. 333.

If the claims of complainants, or any of them, or any part of either of said claims, were without consideration, or based on an illegal consideration, this was matter of defense to be laid before the court by answer. The bill was not bad for that it averred the consideration in part of the debts sought to be enforced was vinous, spiritous or malt liquors, sold by complainants to the partnership, and failed to aver that the sellers were licensed to make such sales. The *prima facie* presumption of law is that they had complied with the revenue statutes, and taken out the prescribed license.

As the bill avers that the partnership business was carried on in the name of Patrick A'Hern, it is fair to assume that the license, under which the partnership sold liquors, was made out in his name alone. We conceive of no reason for holding, even conceding that a liquor license can not be granted to a woman, that a silent partner in the business and assets of the concern, whether man or woman, could in such case claim immunity for his or her interest, on the ground that he or she was without a license or incapacitated to obtain a license in his or her own name. Moreover, we find no warrant in our statutes for the position taken by coun-

sel, that a liquor license can not be issued to a woman, married or single; and certainly no ground can exist for relieving a partnership, one member of which is a married woman, from liability for liquors purchased by the firm, that would not equally apply to all other liabilities, or for exempting such firm from the doctrine established by the cases cited above, which, so far as the partnership assets are concerned, places accountability to creditors on the same footing as that of partnerships composed entirely of persons in all respects *sui juris*.

The operation of the statute quoted at the outset of this opinion—Code, § 1730—does not depend upon the insolvency of the grantor in trust. Its letter and spirit unite to the negation of such a construction. And it is, therefore, not necessary, to present a case for relief under it, for the bill to aver insolvency: the creditor has a right to pursue and subject property conveyed by his debtor, to the latter's own use and benefit, notwithstanding the debtor may have property which might be subjected to the debt.—*Dickson v. McLarney*, 97 Ala. 383; 12 So. Rep. 398.

The foregoing observations dispose of all the demurrers interposed to the bill adversely to the appellant, and the decree overruling them must, therefore, be affirmed.

Dykes v. Bottoms.

Bill in Equity to enforce a Vendor's Lien.

1. *Bill to enforce a vendor's lien; questions of usury and breach of warranty to be decided by the chancellor.*—Where, in a bill in equity to enforce a vendor's lien, the answer of the respondent raises the questions of usury and a breach of the warranty in a deed of conveyance, it is error to order a reference to the register to ascertain whether there was usury in the transaction, and whether there had been a breach of warranty in the deed to the respondent; these questions should be decided by the chancellor.

2. *Usury in purchase price of land.*—Where, after there was a parol agreement for the sale and purchase of land at a certain price for cash, the purchaser informed the vendor that he could not pay for the land in cash, and a sale on a credit was subsequently consummated at an advance of 15 per cent. on the cash price, the vendor's deed of con-

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veyance reciting the latter price as its consideration, and the purchaser executing his promissory notes therefor, the transaction was not usurious.

3. *Description of land in conveyance; no abatement of purchase price when void for uncertainty.*—Where a part of the land in a deed of conveyance is described as “a portion of the northwest quarter of the northwest quarter and a part of the southwest quarter of the northwest quarter of section 28, all in township 7, range 25,” the deed is void as to such land, for uncertainty and indefiniteness in the description; and an abatement of the purchase price will not be allowed the purchaser for a deficiency in the number of acres in said section 28, since both parties must be presumed to have known that the deed conveyed no part of the lands lying in said section.

4. *Abatement of the purchase price of land.*—The defendant in an action to enforce a vendor's lien is entitled to an abatement of the purchase price as to a portion of the lands conveyed in a deed that had not come into his possession, and to which the vendor had no title at the time of his conveyance to the defendant.

APPEAL from the Chancery Court of Dale.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed by James Bottoms against James E. Dykes; and sought to enforce a vendor's lien. On the submission of the cause for decree, on pleadings and proof, and upon the report of the register, the chancellor granted the relief prayed for, and decreed that the complainant should have a vendor's lien, but refused to allow the defendant an abatement for the five acres of land which was shown by the report of the register to have been owned and occupied by some one else at the time of the execution of the deed to the defendant. The defendant prosecutes this appeal, and assigns the decree of the chancellor as error.

H. H. BLACKMAN, for appellant.—There was usury in the notes given for the purchase money of the land. *Uhlfelder & Co. v. Carter*, 64 Ala. 527; *Stewart v. Cross*, 66 Ala. 22; *Dawson v. Burrus & Williams*, 73 Ala. 111; *Bradford v. Daniel*, 65 Ala. 133. The defendant is entitled to an abatement of the purchase price of the land. *Monroe v. Pritchett*, 16 Ala. 785; *Thweatt v. McLeod*, 56 Ala. 375; *Joseph v. Seward*, 91 Ala. 597, 8 So. Rep. 682.

BORDERS & CARMICHAEL, *contra*.—There was no usury in the transactions between the plaintiff and the defen-

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dant.—*Crippin v. Heermance*, 7 N. Y. Ch. Rep. 72; *Farmers' Loan & Trust Co. v. Smith*, *Ib.* 194; *Quackenbush v. Leonard*, 9 Paige Ch. 334; *Cutler v. Wright*, 22 N. Y. (8 Smith) 472; *Hogg v. Ruffner*, 1 Black. (U. S.) 113. There was no breach of warranty with respect to the number of acres conveyed in the deed from the complainant to the defendant.—*Baker v. Clay*, 101 Mo. 553; *Cannon v. Emmons*, 44 Minn. 294; *Agan v. Shannan*, 103 Mo. 661; *Cullers v. Platt*, (Texas), 16 S. W. Rep. 1003; 2 Pom. Eq. Jur., 870.

COLEMAN, J.—James Bottom, appellee, filed the present bill to enforce a vendor's lien for unpaid purchase money due for land sold to respondent. The bill describes the land sold as being the "S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ and the S. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 29, township 7 range 25, containing one hundred and sixty acres, more or less, situated in the county of Dale," &c. This description shows a sale of only one hundred acres. Three portions are mentioned, but the last forty acres, to-wit, the S. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, includes twenty acres described in the first forty, to-wit, the S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 29. No objection seems to have been taken to this omission, and it may be a clerical error in the transcript. The defendant by his answer pleads usury, and also a deficiency in the quantity of land sold and purchased and that conveyed by the deed of conveyance with warranty of title. The answer prays for an abatement of the purchase price, both on account of usury and breach of warranty. The deficiency is claimed to consist of five acres, a part of section 29 conveyed, and six acres in section 28, which latter six acres is omitted entirely from the bill of complaint. The answer sets up as a fact that respondent has never been in possession of the eleven acres of land for which an abatement is claimed, and that he has not been able to acquire possession, by reason of the occupation by others, whose names are given, of said eleven acres of land who are in possession, and holding, the answer avers, under a title superior to that acquired by the purchase and deed received from complainant. There was no action by the court upon objections to testimony. The objections in many instances were not sufficiently specific and might have been disregarded. Section 1798 of the Code de-

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clares when conveyances are self proving, and when a transcript may be admitted in evidence. Copies of conveyances not acknowledged and recorded are not admissible, without the proper predicate, accounting for the absence of the original. After the evidence was closed the court referred to the register to ascertain and report as to whether there was usury in the transaction, and whether there had been a breach of the warranty in the deed of conveyance to respondent. These were questions, under our practice, which should have been decided by the chancellor, and should not have been referred to the register.

Our conclusion from the evidence is, that the transaction was not usurious. It appears that there was a parol agreement for the sale and purchase of the land, at the purchase price of \$900 or \$950, for cash, and that under this agreement the respondent entered upon the possession. No part of the purchase money was paid. This agreement was void under the statute of frauds. After having been in possession some months the respondent informed the complainant that he could not pay for the land in cash. It was then agreed that respondent might purchase the land, by paying one part in cash, and by executing his two notes for the unpaid purchase money, at one and two years; and the difference in the value of the land, for cash, as was first agreed upon in parol, and when sold on a credit, and which latter agreement was concluded in writing, was fifteen *per cent*. The complainant executed his warranty deed to respondent, and the respondent executed his two promissory notes. This was not usury. Respondent owed no debt for the forbearance of which fifteen *per cent*. additional was charged, and the debt thus contracted was not a loan of money. There was a sale of land, the vendor willing to sell for so much at a cash valuation, or for so much on a credit, placing the difference between the cash and credit price at fifteen *per cent*.

There is some difficulty in arriving at a legal conclusion from the facts of the case upon which an abatement of the purchase money for a deficiency in the land sold is claimed. The warranty deed of complainant to respondent, describes the land sold as follows: "W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of section 29, and a portion of the N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$, and

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a part of the S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 28, all in township 7, range 25," &c., without specifying any number of acres. Now, it is clear that as to the lands lying in section 28, the deed is void, for want of definiteness in the description of the land. How much off, and in what part of, these quarter-sections lying in 28, was sold or intended to be sold, can not be ascertained—"there is no land mark to enable a surveyor to find the land." It is not within the influence of the maxim, *Id certum est quod certum reddi*.—*Black v. Tenn. Coal & Iron Co.*, 93 Ala. 109; 9 So. Rep. 537; *Wilkinson v. Roper*, 74 Ala. 140; *L. & N. R. R. Co. v. Boykin*, 76 Ala. 560; *Humphries v. Huffman*, 33 Ohio St. Rep. 395. The respondent does not seek a cancellation of the deed and return of the purchase money. His purpose is to hold on to the land for which he has received a valid deed, and his prayer is for an abatement of the purchase money. There is no possible criterion for ascertaining a proper abatement for the lands lying in section 28. Both parties in law must be held to know that the deed conveyed no part of the land lying in section 28, and the purchaser must be held to have contracted for, and to have executed his notes for, the land properly described, lying in section 29. It would seem that the deed under which the complainant held the land lying in section 28, described his interest in this section precisely as described in the deed by him to respondent. The proof shows that complainant was never in actual possession of any of the land in section 28, and this fact was also known to the respondent.

There can be no difficulty in regard to the five acres of land lying in section 29. The complainant sold and by deed conveyed one hundred and sixty acres in this section to the respondent, and warranted the title to him. The proof shows that five acres of this land was valuable and belonged to other parties, who were living on it at the time of respondent's purchase, and that respondent had never acquired possession of it. So far as we are able to determine from the evidence in the record, the occupants of the five acres, hold by a title superior to that owned by complainant, and which he conveyed to respondent. For the five acres in section 29, the respondent was entitled to an abatement of the purchase price. The case will be reversed and remanded, that it may be referred to the register to restate the account, so

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to allow the respondent an abatement according to the
 ayer of his bill, from the amount due upon his note,
 the fair and reasonable value of the five acres of land
 ng in section 29, and which, from the evidence, seems
 be the property of Ambrose Pelham.
 Reversed and remanded.

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*Bill in Equity by Heirs to declare a Lien upon Land pur-
 chased with Funds of the Estate.*

What is a final decree.—A decree in chancery, which settles all
 equities between the parties, leaving only matters of account to be
 trusted on a reference before the master, is such a final decree as
 support an appeal.

Limitation of appeal; when assignments of error are stricken out.—
 ere an appeal is sued out in a chancery cause more than a year
 er the rendition of a decree which settled all the equities between
 parties, such decree can not be reviewed, and all the assignments
 error relating to matters embraced in that decree should be
 eken out, upon motion, because the appeal was barred at the time
 as taken.

Bill in equity to have a lien declared; what is a final decree.—Where,
 a bill filed by heirs to have a lien declared in their favor upon a
 ain lot, alleged to have been purchased and improved by the ad-
 ministratrix of their decedent's estate, partly with the funds of the
 ate, which lot had been mortgaged by her to her co-defendants, it
 own that a part of the debt secured by said mortgage was an in-
 idual debt of the administratrix secured by a prior mortgage given
 her on said lot, and which was assumed by her co-defendants, a de-
 e holding the mortgage by the administratrix to her co-defendants
 be a superior lien on the lot, to the extent of the debt assumed by
 mortgagees, and that as against the remainder of the debt secured
 said mortgage complainants were entitled to relief, at the same
 e giving particular instructions and directions to the register as to
 manner of taking and stating an account between the parties, set-
 all the equities of the bill as between the complainants and the
 endants, and is a final decree, from which an appeal may be pros-
 euted.

*Misapplication of funds by administrator; rights of heirs and per-
 al creditors.*—Where an administrator has used the funds of his in-
 tate's estate in the purchase of lands, taking the title in himself,

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the distributees and heirs may, at their election, either claim the lands with rents, or hold the administrator responsible for the money with interest and have a lien declared on the land for the payment thereof; but having elected to claim the money and interest, they can not also claim the land on which the money of the estate was invested, or the rents thereof, and in a bill filed by the heirs to have a lien declared in their favor on the lands, there is no error in a decree treating the rents from the land as the property of the administrator, and in applying them to the payment of his individual debts.

5. *Same.*—Where one, who is the administratrix of an estate, borrows money on her own account, with which the estate of her intestate has nothing to do, and pays the money on her individual mortgage debt, and she afterwards uses money of the estate to re-fund her lender, no equity arises out of such a conversion by the administratrix in favor of the heirs of the estate against the mortgagees, to whom she paid the borrowed money.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. WILLIAM H. TAYLOR.

The bill in this case was filed by the children of Patrick Foley, deceased, against Ann Foley, Marx Leva and Aaron Maas, and alleged that said Ann Foley was the widow of said Patrick Foley and the administratrix of his estate; that while acting as such administratrix, she purchased in her own name, and improved a certain lot of land in Selma, Alabama; that in paying for said lot and improvements, she used \$986 of money belonging to the estate of her intestate; that after she purchased and improved said lot, she gave a mortgage on it to Adler, Leva & Co., to secure a debt she owed them, amounting to about \$1,800; that at the time Adler, Leva & Co. took said mortgage, they had notice that said \$986 of money belonging to the estate of said Patrick Foley had been used in purchasing and improving said lot; that Marx Leva, one of the firm of Adler, Leva & Co., afterwards became the owner of said mortgage, and on the 6th of December, 1887, sold said lot, under the power contained in said mortgage in foreclosure thereof; that at said sale, Aaron Maas became the purchaser of said lot, and purchased it for said Marx Leva; that at said foreclosure sale, and before said Maas bid the same off, he was notified that \$986 of the money used in purchasing and improving said lot by said Ann Foley, belonged to the estate of said Patrick Foley, and that complainants, as his children and heirs, would subject said lot to the payment thereof.

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The prayer of the bill was, that said lot be sold, and that complainants "obtain and realize the said sum of \$986, and the interest thereon."

Ann Foley declined to answer the bill, and a decree *confesso* was taken against her. Aaron Maas answered, and admitted the purchase of said lot as charged in the bill, and that complainants gave notice that \$986, the money of the estate belonging to them, had been paid by Ann Foley in the purchase and improvement of said lot, and that he bought it for said Leva with such price. Leva answered denying that any money of the estate of said Patrick Foley, as averred, had been used by said Ann Foley in purchasing and improving said lot; and he set up in his answer—a fact to which no reference was made in the bill—that \$928.15 of the debt secured by said mortgage from said Ann Foley to Adler, Leva & Co., was secured by a prior mortgage given on said lot by her to the firm of Spence & Steele, to whom she was indebted in that sum, which debt and mortgage, on the instance and request of said Ann Foley, said firm Adler, Leva & Co. paid to said Spence & Steele, to secure which and the other sum of \$986, owing by her to them, she executed and delivered her said mortgage to them.

The cause was submitted for final decree on the pleadings and proofs, and on the 3d day of April, 1890; the chancellor rendered a written opinion and decree in the case which was received, filed and enrolled on the 7th of April, 1890. In his opinion, the chancellor said: "The conclusion reached from the authorities and testimony is, that for the amount paid to Spence & Steele and interest thereon, the mortgage must stand as a valid security, and must prevail over the equities of complainants, and that as against the remainder of the debt secured by the mortgage, complainants are entitled to relief."

The decree directed: "(4.) That the mortgage executed by Ann Foley to Adler, Leva & Co., mentioned in the pleadings, is a valid security for the amount and interest thereon, paid by Adler, Leva & Co. to Spence & Steele, and to this extent, is prior and must prevail over complainants' right to relief. (5.) That complainants are entitled to relief; and a lien and trust, as a security to satisfy complainants' demand, is hereby declared in the

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lot and improvements thereon described and conveyed by the mortgage executed by Ann Foley to Adler, Leva & Co., mentioned in the pleadings, subject to the prior lien established and declared in the 4th section of this decree."

Particular instructions and directions were given in the decree to the register in and about taking and stating an account, which was ordered, to ascertain the respective interests of the said Ann Foley individually, and of the complainants, as the representatives of the estate of Patrick Foley, in the purchase and improvement of said lot; to ascertain what part of the payment which had been made as credits on said mortgage belonged to said Ann Foley, or had been derived by her from said estate as rents or otherwise, to which complainants were entitled; and he was directed, in stating the account, to apply the money and assets, if any, which of right belonged to complainants—and which had been received as partial payments upon the mortgage—to the Spence & Steele debt, entitled thereto as a prior debt, and to report what balance of said mortgage debt remained thereafter. The complainants appeal, and assign as error the decree of the chancellor.

JOHN C. REID, for appellants.

PETTUS & PETTUS and SATTERFIELD & YOUNG, *contra* (1.) The decree in this case was filed on the 7th day of April, 1890. It settled all of the equities of the case and determined all the rights of the parties to the suit and nothing is left to be done in the case except to state the account, and ascertain the exact amount due on the different claims. This decree is a final decree, and would have supported an appeal.—*Bradford v. Bradley*, 37 Ala. 453; *Weatherford v. James*, 2 Ala. 170; *Garner v. Prewitt*, 32 Ala. 13; *Jones v. Wilson*, 54 Ala. 50; *Ansley v. Robinson*, 16 Ala. 793; *Hastie & Silver v. Aiken*, 67 Ala. 313 (2.) No appeal was taken from this decree until April 19, 1892, more than two years after said final decree was rendered. At the time the appeal was taken, an appeal from the decree rendered April 7, 1890, was barred by the statute of limitations, and no assignments of error can now be based on that decree. The motion to strike out all such assignments of error should therefore, be granted.—Code, § 3619; *Walker v. Crawford*

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ford, 70 Ala. 567; *Cochran v. Miller*, 74 Ala. 50; *May v. Green*, 75 Ala. 162; *Stoudenmire v. DeBardelaben*, 85 Ala. 85, 4 So. Rep. 723. (3.) Having elected to claim their money with interest, they can not also claim the property in which it was invested or rents thereof. The two claims are repugnant, and can not be insisted on at the same time.—2 Story's Eq. Jur., §§ 1262, 1263; 2 Perry on Trusts, § 842; *Parks v. Parks*, 66 Ala. 326; *Whaley v. Whaley*, 71 Ala. 159.

HARALSON, J.—The decree rendered in this cause, on the 7th April, 1890, was a final decree, which settled all the equities of the bill as between the complainants and defendants. The account ordered was in accordance with the opinion and decree of the court, and looked merely to the perfecting of the decree. To the extent of settling the equities between the parties, it was final, and as to the matter of the taking of the account, it was interlocutory.—*Smith v. Coleman*, 59 Ala. 262; *Jones v. Wilson*, 54 Ala. 50; *Waldrop v. Carnes*, 62 Ala. 374; *Malone & Foot v. Marriott*, 64 Ala. 486; *Broughton v. Wimberly*, 65 Ala. 550; *Walker v. Crawford*, 70 Ala. 567; *May v. Green*, 75 Ala. 162; *Adams v. Sayre*, 76 Ala. 509; *Marshall v. McPhillips*, 79 Ala. 145; *Louisville Manfg. Co. v. Brown*, ante p. 173.

The decree being final, was subject to review on appeal to this court, if taken within a year from the rendition thereof; and no appeal having been taken from it, until the 19th day of April, 1892, it was barred at the time taken, and can not now be reviewed. No assignments of error can be made upon a decree which does not support an appeal, or upon one which is barred. A motion to strike out the errors here assigned, based on this decree, must be granted.—*Stoudenmire v. DeBardelaben*, 85 Ala. 85, 4 So. Rep. 723; *Kimbrell v. Rogers*, 90 Ala. 346, 7 So. Rep. 241; and authorities *supra*.

The account as finally stated and confirmed by the court, contained several items which were excepted to by the complainants, which require notice.

Mrs. Foley bought the lot out of which this litigation springs, having used the money of her intestate in its purchase and subsequent improvement. She rented it out afterwards, and turned the rent contract over to defendants, on which they realized \$700. She borrowed

\$300 from Daniel O'Rourke, on her own account, with which the estate of her intestate had nothing to do, and paid it to defendant Leva, on her individual debt to him, secured by said mortgage, and this money she afterwards refunded to O'Rourke, out of the money of the estate, but it is not shown that defendants had any knowledge or connivance in that transaction. She also paid them, as she claims, the proceeds of five bales of cotton, amounting to \$162.29. These several sums, the complainants claim, ought to have gone as credits on the Spence and Steele debt, of prior claim to defendants' individual debt against Mrs. Foley, and not to the latter, and these constitute the basis of many exceptions in various forms, but to the same effect.

It is a familiar principle, that when an administrator uses the funds of the estate in the purchase of land, taking title to himself, the distributees, may, at their election, either claim the land with rents, or hold him responsible for the money with interest, and have a lien declared on the land for the payment of the same.—*Lehman v. Lewis*, 62 Ala. 131; *Parks v. Parks*, 66 Ala. 327; *Bass v. Bass*, 88 Ala. 413, 7 So. Rep. 243; 3 Brick. Dig. 785, §§ 50, 51.

The complainants made their election, and by their bill seek to charge the defendants with the money of the estate of Patrick Foley which went into the lot, with the interest thereon, and not to recover the lot itself. Having elected to claim the money and interest they must stand by their election, and can not also claim the lot in which the money of the estate was invested, or the rents thereof. By this election, they confirm the title of Mrs. Foley to the lot and to its rents. There was no error, therefore, in treating the rents of the lots as hers, and in applying them to her individual debt to defendants, Leva & Co.—2 Story Eq. Jur., §§ 1262, 1263; 2 Perry on Trusts, § 842; *Whaley v. Whaley*, 71 Ala. 161; *Parks v. Parks*, *supra*; *Preston v. McMillan*, 58 Ala. 84.

The exceptions based on the supposed erroneous application of the \$300 borrowed by Mrs. Foley from O'Rourke, with which she made a payment to the defendants, on her debt to them, is equally untenable. When she borrowed and paid the money, it was her individual property. The estate had no right or equity in it, and the fact that she subsequently took a like amount from

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the estate of her intestate, and paid this debt to O'Rourke, did not change or have any effect on the transaction of the payment of the sum originally borrowed from him to defendants. No equity in her favor or that of her children, the complainants, as against the defendants, arises out of such a conversion of the funds of her intestate.

As to the application of the proceeds of the five bales of cotton, it is sufficient to say, there is no evidence to show that they belonged to the estate. Mrs. Foley testified, she was doing a mercantile and advancing business to farm hands, on her own account, and as to one of the bales, she testifies, positively it was hers, and as to the others, she did not say they belonged to the estate, but she did say, she was receiving, at the time, cotton of her own, on account of advances. There was no error in the ruling as to this cotton.

We find no error in the record, and the decree of the chancery court is affirmed.

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Bill in Equity to enforce Vendor's Lien.

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1. *Equitable titles; priority.*—As between parties claiming under equal equitable titles, the priority of claim is determined by the priority of time.

2. *Title acquired by purchaser at execution sale.*—F., after the execution of a mortgage to M., which was still unsatisfied, sold the land conveyed therein to W. After the agreement of sale, but before the conveyance by deed, judgment was recovered in the United States Circuit Court against F. After F. had conveyed the lands to W. by deed, the United States marshal sold the same land under an execution issued upon the judgment recovered against F., and at this sale T. became the purchaser. *Held*, that W. and T. are both equitable claimants, and that the equity of W., being the older, is superior to that of T., conveyed by the marshal's deed.

3. *Right of purchaser at an execution sale.*—When, before the mortgage debt is paid, the mortgagor agrees to sell to a third person the lands conveyed in said mortgage, and after this agreement a judgment is recovered against the said mortgagor, and execution thereunder is levied upon the same lands, and the said lands are sold under

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this execution, after the execution of the deed in compliance with the agreement of sale, the purchaser at said execution sale acquires the equity of redemption, and as the holder of such equity, is entitled to the excess of the balance due the mortgagor paid by the one who purchases at a subsequent sale under the mortgage.

APPEAL from Chancery Court of Montgomery.

Heard before the Hon. JOHN A. FOSTER.

The facts of this case are sufficiently stated in the opinion. On the final submission of the cause, the chancellor decreed that D. S. Troy had no equity or claim to the lands involved in the suit, nor in the use and occupation or rents of any of the land; and also decreed that D. S. Troy should pay all the costs in the suit created by the interposition of his claim, and that Walter Bros. should pay the balance of the costs of the suit. On this appeal by D. S. Troy and Walter Bros. the former assigns as error the final decree of the chancellor, and the latter assign as error that portion of the decree of the chancellor which holds that Walter Bros. should pay a portion of the costs of the suit.

TOMPKINS & TROY, for appellants.

BRICKELL, SEMPLE & GUNTER, *contra*.

STONE, C. J.—The litigation presented in this appeal may truly be styled many-sided. It originated in a bill filed by appellee, May, to enforce a vendor's lien on lands purchased by Walter Brothers from Ferrell. The purchase by Walter Bros. was made May 12, 1885, and they then gave as purchase-money three several notes, each for the sum of six hundred dollars, but they obtained no title from Ferrell until August 13, 1885. Under a judgment against Ferrell obtained in the circuit court of the United States after May 12 aforesaid, and under execution issued thereon, the marshal sold the land on September 13, 1885, and Troy became the purchaser, receiving a conveyance. Up to this time Walter Brothers had not taken visible possession of the land so purchased from Ferrell, nor was there any notice of their purchase, actual or constructive, until the registration of the Ferrell deed to them, soon after its execution in August. The execution under which Troy purchased went into the hands of the marshal June 20, 1885.

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A few days after the purchase of Walter Brothers from Ferrell, and before the judgment was rendered under which Troy purchased, Ferrell sold and transferred to May the second and third of the purchase money notes given by Walter Bros. No question is raised on the *bona fides* of this transfer, nor on the sufficiency of the consideration paid by May. There is testimony tending to show that before making this purchase May consulted Walter Brothers, and was assured by them that they had no defense to the notes. And no question was raised on this feature of the controversy, by any assignment of error.

Before May's suit was brought to a hearing, Walter Brothers, in July, 1887, filed an original bill in the nature of a cross-bill, and made May, Troy and Ferrell defendants to their suit. In their bill they mentioned the other purchase money note which had not been transferred to May, charged that it too had been assigned to some person, alleged to be unknown. That suit was brought to this court by appeal, and is reported as *Troy v. Walter Bros.*, in 87 Ala. 233, 6 So. Rep. 54. The substance of the facts as then presented in the pleadings and proof is set forth in the report of that case. It will be seen that up to that time it was not shown or averred who held the other note—the one not purchased by May—nor was it brought to the notice of the court in either of the suits that there was an outstanding, unsatisfied mortgage on the lands, executed by Ferrell, and duly recorded, which was older than the sale to Walter Brothers. On the facts as they then appeared, when the marshal made the sale and conveyance to Troy the legal title of the lands was in Ferrell, and that legal title, for the term of Ferrell's life, passed by the conveyance to Troy. We so ruled on that appeal.—*Troy v. Walter*, 87 Ala. 233, 6 So. Rep. 54; *Daniel v. Sorrelle*, 9 Ala. 436; *Jordan v. Mead*, 12 Ala. 247; *Preston v. McMillan*, 58 Ala. 84; *Wood v. Lake*, 62 Ala. 489; *McCarthy v. Nicrosi*, 72 Ala. 332; *Watt v. Parsons*, 73 Ala. 202; *Dickerson v. Carroll*, 76 Ala. 377; *King v. Paulk*, 85 Ala. 186, 4 So. Rep. 825; *Paulk v. King*, 86 Ala. 332, 6 So. Rep. 612.

After the reversal in this court—87 Ala. 233—the pleadings were changed in the court below, and the issues thereby materially enlarged. It was averred that

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long before the agreement of sale from Ferrell to Walter Bros., Ferrell, being indebted to Molton for money borrowed and unpaid, had executed a mortgage to said Molton, conveying said land as security for the payment of the debt, with a power in the mortgagee to foreclose by a sale of the land, if there was default in payment. This mortgage had been duly and properly recorded. There was a balance due, and still unpaid on the mortgage debt. Soon after the agreement of sale by Ferrell to Walter Brothers, the former turned over to Molton the purchase money note, the first of the series, (the one not traded or transferred to May,) as collateral security for the debt he owed him, so secured by the mortgage. This is the note which Walter Bros. alleged in their bill had been transferred, but they did not know to whom. It was also averred in the amended pleadings that, at a time which was probably after the reversal in this court, Molton had advertised and sold said lands under the power contained in his mortgage, and that Walter Bros. became the purchasers, and received a conveyance. It is shown that at this sale by Molton, the bid and purchase were at a sum in excess of the balance due Molton on the debt secured by the mortgage, including expense of sale, and that this excess was paid by Walter Bros. to Molton, and by him to Ferrell. Molton was made a party to the litigation at this stage, and answered. All the foregoing averments were shown to be true, and there was no conflict in the testimony as to any of them. They are the admitted facts in the case, as now presented.

As we have said, when this case was first before us—87 Ala. 233—the record showed that Troy, by the deed the marshal gave him, acquired the legal title to the land, without notice, actual or constructive, of the equity which Walter Bros. had in virtue of their purchase from Ferrell. The present record adds strength to the equity of Walter Brothers, in this, that although they had not paid the purchase money, and had received no title when the lien attached under which Troy claims, yet, they had placed it out of their power to retire from the purchase without great loss. This because they had stopped themselves from making defense to the notes held by May. The present record also presents Troy's claim in a changed light. The marshal's deed did not convey

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to him a legal title, but only an equity of redemption—an equitable title. So, the contest between him and Walter Bros. is a contest between equitable claimants, the claim of each being meritorious, when considered by itself. In 1 Pom. Eq., § 414, it is said: "As between persons having only equitable interests, if their equities are equal, *qui prior est tempore, potior est jure*." Section 415. "When several successive and conflicting claims upon, or interests in, the same subject matter are wholly equitable, and neither is accompanied by the legal estate, which is held by some third person, and neither possesses any special feature or incident which would, according to the settled doctrines of equity, give it a precedence over the others wholly irrespective of the order of time,—under these circumstances the principle applies, and priority of claim is determined by priority of time."

In defining the constituent elements of the defense of *bona fide* purchase without notice, this court, in *Craft v. Russell*, 67 Ala. 9-12, said: "A plea put in by a defendant claiming to be a *bona fide* purchaser for value without notice, in order to be available as a protection against a prior equity, * * must aver clearly, distinctly and without equivocation, the following facts: 1. That he is the purchaser of the legal, as distinguishable from an equitable, title."—*Hooper v. Strahan*, 71 Ala. 75; *O'Neil v. Seiras*, 85 Ala. 81; 4 So. Rep. 745; *Ledbetter v. Walker*, 31 Ala. 175; *Wells v. Morrow*, 38 Ala. 125; *Buford v. McCormick*, 57 Ala. 428; *Thames v. Rembert*, 63 Ala. 561; *Boone v. Chiles*, 10 Pet. 177; *Tourville v. Naish*, 3 P. Wms. 307; *Peabody v. Fenton*, 3 Barb. Ch. 451; *More v. Mayhew*, Freem. Chy., (Eng.) 175.

But the direct question presented by this record was decided by this court on a former day of this term. *Overall v. Taylor*, 99 Ala. 12, 11 So. Rep. 738. Walter Bros. having the older equity, their claim, as represented by the two notes traded to May, is superior to that conveyed by the marshal's deed to defendant Troy. So, also, Molton's lien, secured by the mortgage made by Ferrell to him, was paramount to all other claims brought to view in this record, and to the extent that debt was unpaid, Walter Bros. were fully justified in making payment, when they became purchasers under Molton's foreclosure sale. This they were required to do, because of the mortgage itself, and because one, the first, of their

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purchase money notes had been placed with Molton by Ferrell as collateral security for the mortgage debt. They could not obtain an unincumbered title to the lands they had purchased, until this mortgage lien was removed.

In purchasing at the mortgage sale Walter Bros. bid and paid a sum in excess of the balance due to Molton, supplemented with the expense of advertising and selling. This they should not have done. The proceedings in the courts, of which proceeding, being parties, they had notice, gave them information that Troy had become the owner, for Ferrell's life, of the equity of redemption, and that, consequently he had become the owner of all the purchase money indebtedness which was still the property of Ferrell, after deducting therefrom the balance due on the mortgage. We say *the balance*, because the sum we are considering was that part of the purchase-money which was evidenced by the note first due—the note transferred to Molton—and the proven age of Mr. Ferrell shows, according to the tables of mortality, the amount of that note was not in excess of the value of his life estate. His expectation of life was then about fourteen years. The sum paid by Walter Brothers in excess of the balance due Molton belongs, and should have been paid by them, to D. S. Troy.

Errors have been assigned severally by Walter Bros. and by D. S. Troy. The former—Walter Bros.—can take nothing by their appeal. The chancellor erred in withholding from appellant Troy the relief indicated above. There were no questions raised which require us to go further than this.

The decree of the chancellor is reversed, and a decree here rendered ordering that Walter Brothers pay to D. S. Troy the balance of the purchase money note first due—the note which was placed with Molton—in excess of the sum due on the Molton mortgage at the time of the sale; but they will be allowed a further credit of the expense attending the foreclosure sale; and they will be charged with all proper interest. A lien is declared on the land, secondary to that decreed in favor of May, for the enforcement of this part of the decree. A reference to the register is ordered that he may state the account on the basis here indicated, and report his finding to the chancellor. The decree of the chancellor, apportioning the

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costs of this litigation, is modified to the following extent: The chancellor decreed that D. S. Troy pay all the costs created by the interposition of his claim. It is now ordered and decreed that one-half of the costs that have been incurred in the assertion and resistance of Troy's claim be taxed against him, and the other half against Walter Brothers. We make this division because Troy claimed more than he was entitled to, and Walter Bros. contested his right to anything. Let the costs of appeal be paid by Walter Brothers.

Reversed, rendered in part, and remanded.

Knight v. Alabama Midland Railway Company.

Action of Ejectment.

1. *Title to support ejectment; construction of deed for right of way.*—Plaintiff and his wife executed to the trustee of a railroad company about to be formed a deed of the right of way over plaintiff's land for a railroad "from M., Ala., by A., Ala., to C., Fla., or other points in southeast Ala. or Fla.," provided that the road should be built within three years from a certain date. The company was incorporated, and within three years built a road over a right of way granted in the deed, from M. by A. to L., a station south of M., and in the direction of C. Held, that L. was in "southeast Ala.," within the meaning of the deed, and hence plaintiff could not recover in ejectment against the company owning and operating the road.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

This was a statutory action of ejectment instituted by T. D. Knight against the Alabama Midland Railway Company, on May 19, 1890, and sought to recover a portion of the defendant's right of way, which was specifically described in the complaint.

The cause was tried upon an agreed statement of facts, of which the following are material to the cause here on appeal:

On April 10th, 1886, the plaintiff owned the land sued for in this action together with his wife, and on that day

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executed the following deed: "Know all men by these presents, that whereas the formation of an incorporated railway company for the building of a line of railway from Montgomery, Alabama, by Ada, Alabama, to Chattahoochee, Florida, or other point in southeast Alabama or Florida, is contemplated by certain citizens of Alabama and of New York, upon condition that certain donations of land are made and other benefits are granted to aid in its construction, which said railway company will be known and called the Montgomery & Florida Railway Company. And whereas, we, T. D. Knight, and D. A. Knight of said county, desiring to aid in the building of said road, and desiring that said line of road when built shall pass over my lands, or as near my lands in said county as possible; now, therefore, in consideration of the premises, and in order to encourage and promote the organization of such a company to build such a railway, and to aid the building of such a railway by any such company as may be organized for the purpose of building it, and as an inducement and aid to such company to construct its line of railway upon and across my premises, or as near thereto as practicable, and in further consideration of ten dollars to me in hand paid by V. B. Watson, trustee, the receipt whereof is hereby acknowledged, we, the aforesaid T. D. Knight and D. A. Knight and his wife, do hereby grant, bargain, sell and convey unto the said Watson, as trustee for such railway company a right of way is contemplated herein and referred to above, in the county of _____, a right of way for said railway over and across any or all of my lands, in Montgomery county in said State, seventy-five feet on each side from the centre of the track and road-bed, to be selected and located by such company, with the right and privilege of entering upon and using said right of way and all earth, timber, and trees thereupon for the construction of said railway. If said railway is built across my said lands, the said company shall have the right to fell any trees outside of the right of way, which in its judgment shall in any manner injure its road-bed or tracks, by shading the same or otherwise, and to cut all necessary ditches to properly drain and protect said road-bed and track and right of way, and to divert any stream flowing on said right of way for the same purpose, and to use the dirt or stone on the land adjacent to construct

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road-bed. If said railway passes upon or near my said lands, the privilege of using any stream or lake of water on the same, or the lands adjacent, for uses of said railway, and of crossing my lands to convey the water to the railway, provided the water is not taken from more than half a mile from said railway. To have and to hold the real estate, rights of way, the rights and uses of water, and other privileges hereby conveyed unto the said V. B. Watson, trustee, as aforesaid, his successors in trust and assigns forever in fee-simple. When said railway company is organized the said V. B. Watson, trustee, shall, without delay and upon request of said company, execute and deliver to said company in its corporate name, its successors and assigns, a conveyance investing them with the rights, title, and interest to and in the property, grants, and privileges hereby conveyed and bestowed just as it is by this conveyance vested in such trustee, named herein. This deed shall also be void and of no effect if said railway is not constructed within three years from the first day of July, 1886."

The Montgomery & Florida Railway Company, having been duly incorporated under the general incorporation laws of the State of Alabama, built, equipped and operated a railroad in a due southerly direction from Montgomery, Alabama, via Ada to Luverne, a station 51 miles south of Montgomery in the direction of Chattahoochee, Florida, or other point in southeast Alabama or Florida. This road was built by the Montgomery & Florida Railway Company, was constructed over and along the right of way mentioned in the deed from plaintiff to Watson as trustee, and the right of way as selected by said railway company and occupied by it was seventy-five feet wide on each side from the centre of its track. After the Montgomery & Florida Railway Company had built and equipped the road, and it was being operated via Ada to Luverne, as aforesaid, all its rights, franchises, tracks, road-bed, rolling stock, rights of way, equipments, lands and appurtenances (including the estate here sued for) were sold, at public outcry under a foreclosure decree of the United States Circuit Court to satisfy a first mortgage bonded indebtedness thereon. Said Knight never interposed any objection whatever to said sale, and never made known or asserted to said purchasers any right, title, claim or

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interest whatsoever to any of the estate here sued for. Shortly after said purchase, the purchasers of said railroad, in the mode prescribed by statute, incorporated and organized the North West & Florida Railroad Company as the successors and assigns of the Montgomery & Florida Railway Company, and operated the said road between its terminal points, Montgomery and Luverne until July, 1889. In July, 1889, the Alabama Midland Railway Company, incorporated and duly organized under the laws of Alabama, purchased the property and franchises of the North West & Florida Railroad Company and consolidated the two roads, in the manner prescribed by statute, under the name of The Alabama Midland Railway Company; and still operates the branch of this road from the city of Montgomery to Luverne.

On the 16th day of June, 1890, the said V. B. Watson, as trustee, executed to the Alabama Midland Railway Company a deed conveying the right of way conveyed by T. D. Knight and wife to V. B. Watson as trustee. The said Montgomery & Florida Railway Company, The North West & Florida Railroad Company and the Alabama Midland Railway Company continuously in the order named, and as the successors and assigns the one of and to the other, have in good faith held actual, open, notorious possession of the land conveyed as a right of way and the interest therein sued for in this action from April 10th, 1886, up to and including the day of the trial, which was in 1891—a period of more than three years before the commencement of this suit.

Upon this agreed statement of facts the plaintiff requested the court to give the general affirmative charge in his behalf, and duly excepted to the court's refusal to give said charge. The court at the request of the defendant gave the following written charge to the jury: "If they believe all the evidence they must find for the defendant." To the giving of this charge the plaintiff duly excepted.

There was judgment for defendant, plaintiff appeals, and assigns as error the refusal of the court to give the general affirmative charge in his behalf, and giving the charge requested by defendant.

WATTS & SON and ARRINGTON & GRAHAM, for appellant, cited 2 Washburn on Real Property, pages 13-17;

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Ludlow v. New York & H. R. R. Co., 12 Barb. 440; *Nicoll v. N. Y. & E. R. R. Co.*, 2 Kernan 121; *Hayden v. Stoughton*, 5 Pick. 528; *Allen v. Howe*, 105 Mass. 241; 11 Paige 427; *Sperry v. Miller*, 8 N. Y. 336; *McKelway v. Seymour*, 5 Dutch. 329.

A. A. WILEY, *contra*, cited *Hammond v. Port Royal & Augusta Ry. Co.*, 11 Amer. & Eng. R. R. Cas. 371; *Latimer v. New Orleans, Jackson & Grt. Northern R. R. Co.*, 16 La. Ann. 79; *Chicago Ry. Co. v. Minn. Cent. R. R. Co.*, 10 Amer. & Eng. R. R. Cas. 234; *Lehman, Durr & Co. v. Robinson*, 59 Ala. 234-35; *Nicoll v. N. Y. & E. R. R. Co.*, 12 N. Y. 121.

McCLELLAN, J.—We hold that the town of Luverne is “in Southeast Alabama” within the terms of the deed from Knight to Watson, trustee &c.; and that the building within three years from the date thereof of the “Montgomery and Florida” railroad by the town of Ada to that point was a compliance with the condition subsequent contained in said deed, the purpose of which was to avoid the conveyance in the event a railroad was not built within the time mentioned “from Montgomery, Alabama, to Chattahoochie, Florida, or some other point in Southeast Alabama or Florida”; the fact being that the land involved is situate along the line of said road as built between Luverne and Montgomery.

Affirmed.

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Bill in Equity to enforce a Trust in Lands.

1. *Bill to enforce trust; when it contains equity.*—A bill in equity which avers that the complainants verbally contracted to purchase a certain lot of land, and not having the means to make the cash payment agreed upon, procured a third person to advance the money as a loan, and to become surety for the deferred payment, that to secure such third person against loss, it was agreed that the deed from the vendor should be executed direct to him, who should re-convey it to complainants upon being repaid the amount loaned and advanced,

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that the complainants had paid the amount borrowed and the deferred payment, but that the respondent, to whom such deed was made, refused to re-convey the property to them, contains equity; and upon proof of the averments, complainants will be entitled to the relief prayed for, and a decree should be rendered investing the title to the land in them.

2. *Conveyance absolute in terms; evidence necessary to declare it a mortgage.*—When parol evidence is relied upon to have a deed of conveyance of lands, absolute in its terms, declared a mortgage or security for a debt, or to have a resulting trust in lands declared, the evidence adduced must be clear and convincing.

3. *Bill to enforce trust; when evidence insufficient to authorize relief.*—In a bill filed to establish a trust in land, the complainants claimed that they purchased the lands under a parol agreement; that defendant loaned them money to make the cash payment, and became security for deferred payments; that title was taken in defendant's name to secure him, he agreeing to convey the lands to complainants on re-payment by them of his loan, and the balance of the purchase price. The only evidence to establish these facts was the testimony of one of the complainants, and of persons who derived their information from him. The testimony of the defendant, of the vendor, and of the person who took the acknowledgment sustained the claim of defendant, that he made the purchase for himself, that he made the cash payment and paid at maturity his note, executed for the deferred payment; and that he verbally promised to sell the land to the complainants, who had been unable to purchase it; and that complainants knew of the sale of part of the land by the defendant, and witnessed valuable improvements thereon, but raised no objection or claim. *Held*, that the complainants were not entitled to the relief prayed. and that the bill was properly dismissed.

APPEAL from the Chancery Court of Dale.

Heard before the Hon. JOHN A. FOSTER.

The bill in this case was filed on February 16, 1891, by E. R. Jordan and his wife, Mattie Jordan, against Bartow Garner and John McNair. The prayer of the bill was to have a deed made by one Mrs. Gray to the defendant Garner declared a mortgage, and have the title to the land therein invested in the complainants. The defendant McNair had, prior to the filing of the bill, purchased a portion of the land involved in this suit from the defendant, Bartow Garner.

On the final hearing of the cause, the chancellor decreed that the complainants were not entitled to the relief prayed for, and ordered their bill dismissed. Complainants appeal, and assign this decree as error. The facts of the case are sufficiently stated in the opinion.

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BORDERS & CARMICHAEL and W. D. ROBERTS, for appellants.

H. H. BLACKMAN, *contra*, cited Code of 1886, §§ 1732, 1845; *Heflin v. Milton*, 69 Ala. 354; 2 Leading Cases in Equity, 974-8.

COLEMAN, J.—The case made by complainant's bill is, that they verbally contracted with one Mrs. Gray to purchase a certain lot of land from her, and not having the means to make the cash payment required, procured Bartow Garner to advance, as a loan to them, the cash payment, and to become surety for the deferred payment; that to secure Bartow Garner against loss, it was agreed that the deed be executed direct to Garner, who should reconvey to complainants, upon being repaid the loan or advance made by him as the cash payment. The bill then avers, the payment by complainants of the deferred payment for the land, and also the payment of the loan or advance to Garner. The prayer of the bill is that the title be invested in complainants. Garner sold the land to different parties, who are made parties defendant, and who, it is charged, purchased with a knowledge of complainants' equities. The bill has equity, and upon proof of the averments the complainants would be entitled to relief.—*Bates v. Kelly*, 80 Ala. 142.

The answers deny all the material averments of the bill. Bartow Garner, in his answer, claims that he purchased the land for himself and on his own account; that he made the cash payment, and executed his note for the deferred payment, which he paid at maturity for himself with his own money; that Jordan voluntarily offered to sign the note for the deferred payment, which offer he did not decline, but that his name added no value to the note. He further answers, that he did verbally promise Jordan to sell him the lands, and that he held the land until Jordan satisfied him that he would not be able to pay him for the land and to dispose of it. Garner's vendee answers, and states that before concluding his purchase he spoke to Jordan, and that Jordan referred him to Garner, as the proper person with whom to contract, and set up no claim to the land. The evi-

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dence shows the lots have greatly increased in value. The answers set up a complete defense to complainants' bill. There is no difficulty in the law of the case. There is no question of a legal conditional sale made by the pleadings or the evidence, and this question will not be considered. It is not pretended that there was any written memorandum of any agreement between Garner and the complainants, or either of them. Before a deed of conveyance of lands, absolute in its terms, will be declared a mortgage, or security for a debt, or a resulting trust in lands will be declared upon parol evidence, it must be clear and satisfactory.—*Adams v. Pilcher*, 92 Ala. 474, 8 So. Rep. 757; *Peagler v. Stabler*, 91 Ala. 308, 9 So. Rep. 157; *Cosby v. Buchanan*, 81 Ala. 574, 1 So. Rep. 898; *Mitchell v. Wellman*, 80 Ala. 16.

There is no evidence in the record tending to show that Mattie Jordan, the wife of E. R. Jordan, owns any interest in the lands, evidenced by any paper title, or by any parol or written agreement with Garner. Her claim is that she and her husband were equally interested in the parol agreement for the purchase of the land from Mrs. Gray, and that it was understood between her and her husband that she was to be equally benefitted in the cash advanced as a loan by Bartow Garner. It is not pretended that respondents had any notice of her claims. Unless her husband, E. R. Jordan, proves his case, she is not entitled to any consideration. Whether she has any enforceable right against her husband, will not be considered, as this question does not concern the respondents.

The testimony of E. R. Jordan fully sustains the averments of his bill. That of his wife, mother-in-law and sister-in-law, on their direct examination, go far to sustain him; but scrutinizing their testimony elicited on cross examination, and comparing it with other testimony, it is clear, that the material facts testified to by them are mere hearsay, and derived from Jordan himself. They were not present and know of no agreement, of their own knowledge, that Garner advanced the cash payment for the land as a loan. They were not present, and do not know, farther than was told them by E. R. Jordan, of any payment made at any time by E. R. Jordan, either to Mrs. Gray, from whom the land was purchased, or to Bartow Garner. On the other hand, the

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evidence of Garner, that of the justice of the peace who was present when the cash payment was made, and who took the acknowledgment of the deed, and of Mrs. Gray herself, the vendor, sustain the averments of the answer. In addition, the evidence of McNair, that Jordan set up no claim to the land, and referred him to Garner, as the proper person from whom to purchase, and the further fact that Jordan knew of the sale of the lands by Garner, witnessed valuable improvements erected thereon by the purchasers without objection or claim, are conclusive facts to our minds that he is not entitled to relief.

There is no error in the record, and the decree of the lower court must be affirmed.

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Bill in Equity to have Deed declared a Mortgage.

1. *When deed absolute in form declared a mortgage.*—On a bill, filed for that purpose, a deed, absolute on its face, will be declared a mortgage, when it is shown that the complainant purchased the lands, and upon payment of three-fifths of the purchase price received from the vendor a bond for title, that defendant, under an agreement with complainant, advanced for him to the vendor the balance of the purchase money, for which amount, with agreed interest, complainant executed his note to defendant, which note was a continuing debt, that the vendor had no negotiation with the defendant for the sale of the land, but executed the deed to him by direction of complainant, in consideration of the payment by him for complainant of the balance due upon the land, which balance was greatly less than the true value of said land.

APPEAL from the Chancery Court of Crenshaw.
 Heard before the Hon. JOHN A. FOSTER.

On the 22d February, 1890, the appellee, Charles McKenzie, filed his bill in the chancery court of Crenshaw county, against Richard S. Hughes and others, the appellants; and alleged therein that about eight years before the filing of the bill, he purchased from T. J. Boswell and wife the 400 acres of land described in the bill,

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for the agreed price of \$1,000 ; that he paid \$600 in cash and agreed to pay the remaining \$400 at a future day, for which he executed to said T. J. Boswell his promissory note, and Boswell and wife gave complainant their bond to make to him a conveyance to said land, with the usual covenants of warranty, upon the payment of said note for the balance of the purchase money ; that on the 29th September, 1884, complainant borrowed from defendant Hughes the sum of \$400, and procured said Hughes to pay the same to said Boswell for him ; and for the purpose and with the intention of securing the repayment of that sum so borrowed to said Hughes, complainant procured and authorized said Boswell and wife to convey said land to said Hughes ; that contemporaneously, Hughes executed to complainant a defeasance, to the effect, that said conveyance to him was intended to be and was a mortgage to secure the repayment of said sum of \$400 borrowed by complainant from him ; that afterwards, about the 1st of January, 1886, Hughes entered into the possession of the said lands, under his said mortgage, and now retains the possession thereof, together with about \$600 rents, derived therefrom since he went into their possession.

Complainant further alleges, that he has paid his indebtedness to said Hughes, but if he is mistaken, he is ready and willing and offers to pay him whatever sum the court may ascertain to be due and owing by him to said Hughes on said note and mortgage.

He further alleges that on the 28th March, 1884, he and his wife mortgaged said lands to one M. W. Wimberly to secure a debt therein named ; that said Wimberly sold and transferred said debt and mortgage to Thomas F. Owen, and afterwards, he sold and transferred the same to H. T. Wimberly ; that complainant may be due and owing something on last named mortgage, and if so, he is willing and offers to pay whatever sum the court may ascertain to be due and owing in that behalf. The said Hughes, H. T. Wimberly and Mrs. N. F. McKenzie, wife of complainant, are made parties defendant to the bill.

The prayer is, that the conveyance from T. J. Boswell and wife to said Hughes be decreed to be a mortgage, to secure said sum of \$400 ; that a reference be ordered to the register, to ascertain what, if any thing, is due and

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wing by complainant on said mortgage to said Hughes and said Wimberly; that complainant be permitted to pay any such sums, and that, thereupon, said mortgages be cancelled and plaintiff put into possession of said lands; that said Hughes be held to account for the rents of said lands to complainants since he went into possession of the same, and for general relief.

H. T. Wimberly answered the bill, claiming that there was due and owing on his mortgage about \$395, and that it is a valid and superior lien to all others on said lands, as security for the payment of said indebtedness. The defendant Hughes answered denying the transaction of the Boswell conveyance to him, as stated by complainant, and states the same to have been as follows: that complainant applied to him, before said conveyance was executed to borrow the remaining sum due as purchase money, proposing to give defendant a mortgage on said lands as security, which proposition defendant refused to accept; that complainant came again to borrow the four hundred dollars for the purposes specified, and stated that if defendant would pay off the remaining note due to Boswell on the land, he would let defendant have it on his own terms; and defendant agreed, if Boswell would make to him a deed in fee to the lands, he would pay him the \$400; whereupon complainant met defendant at the house of Boswell, and defendant then and there paid him the \$400, and he and his wife executed the conveyance to defendant. And, afterwards, defendant verbally contracted to sell the lands to complainant for \$480, provided it was paid within twelve months, and took the note for that sum from him, payable Oct. 1st, 1885; that defendant made no other contract with complainant besides this one, except that it was further agreed, that if complainant could not pay that sum, within the twelve months, he was to pay \$150 rent for 1885; that complainant failed to pay either said sum or the rent, and at request of complainant, defendant agreed to allow him to retain possession for the year 1886 at \$100 rent, and for the year 1887, at the agreed rent of \$150; and in the latter part of 1887, complainant came and stated that he was unable to pay either rent or purchase money, whereupon defendant cancelled all the rent contracts, and agreed to cancel the note for \$480, and remit the interest on a note of complainant and

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one Merrill for about \$80, whereupon the whole transaction was closed, complainant moved off, and defendant took possession of said lands. The deed from Boswell and wife to defendant recites the consideration thereof to be \$600 paid by complainant, and \$400 paid by defendant, and refers to complainant's note to defendant for \$480, and the deed bears the same date as said note.

The court, upon pleadings and proofs, rendered its decree declaring said deed to be a mortgage to secure said sum of money advanced by defendant Hughes to complainant, and ordering an account. The defendants appeal, and assign this decree as error.

GAMBLE & POWELL, for appellants, cited, *Botsford v. Burr*, 2 Johnson's Ch. 405; *Knaus v. Dreher*, 84 Ala. 319, 4 So. Rep. 287; *Micou v. Ashurst*, 55 Ala. 607; *Moseley v. Moseley*, 86 Ala. 289, 5 So. Rep. 732; *Downing v. Woodstock Iron Co.*, 93 Ala. 263, 9 So. Rep. 177.

J. C. RICHARDSON, *contra*, cited, *Downing v. Woodstock Iron Co.*, 93 Ala., 263, 9 So. Rep. 177; *Parmer v. Parmer*, 88 Ala. 545, 7 So. Rep. 657; *Daniels v. Lowery*, 92 Ala. 521, 8 So. Rep. 352; *Douglass v. Moody*, 80 Ala. 66; *Turner v. Wilkinson*, 72 Ala. 366; *Rapier v. Gulf City Paper Co.*, 77 Ala. 134; *Nelson v. Kelly*, 91 Ala. 574, 8 So. Rep. 690.

HARALSON, J.—There were four persons present when the deed from Boswell to defendant was executed and delivered,—the complainant, the defendant, Lee and Boswell. The deed from Boswell to defendant is absolute in form. It recites a consideration of \$1,000 for its execution,—\$600 as having been paid by complainant, and \$400 by the defendant.

There is no dispute of the fact, that about 1882 complainant purchased the lands in controversy from Boswell, for the consideration of \$1,000; that he paid in cash a part of the purchase money, and executed his note for the balance, and Boswell gave complainant his bond, conditioned to make title to the land upon the payment of the purchase money in full; and, at the date of said conveyance from Boswell to defendant, complainant had paid to Boswell \$600, making payment on that day, as Boswell says, of \$40, leaving a balance due to be

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paid of \$400. On the day that said conveyance was executed, and on which defendant paid to Boswell four hundred dollars, complainant executed to defendant Hughes a note for \$480, payable on the first day of October, 1885, the consideration being, as expressed, "for value received of him."

Complainant deposes in reference to this note, that it was for money borrowed from defendant, with which to complete the payment for the land to Boswell; that defendant had agreed to let him have the sum needed for the purpose, at 20 *per cent.* interest, and that this note is for that sum, with \$80 added as interest, and that defendant gave to him a written obligation to reconvey the land to him on the payment of that note, which obligation was destroyed by fire, with his dwelling, in the fall of 1887; and that the deed was executed to defendant to secure that loan.

J. A. Lee testifies, that he was acquainted with the land transaction between complainant, defendant and Boswell; that he was present, when the conveyance from Boswell to Hughes was executed; that its acknowledgment was taken before him as an officer, and the deed was made for the purpose, and under the agreement by defendant and complainant, that it was to secure to defendant the payment of \$400 due by complainant to him; and he states, as his best recollection, that there was a written agreement between them to that effect, the contents of which, as he gives them, were, "that the \$400 with interest should be due and payable on the 1st day of October, 1885, and if said McKenzie failed to pay said amount when due, said Hughes was to have the reasonable rent of the land until he was paid the said amount."

T. J. Boswell testified, that the consideration, as expressed in his deed to the defendant, is true: that complainant paid him \$600, and defendant paid him \$400, at the instance and request of complainant; that he knows nothing of the transaction between the complainant and defendant, further than that he executed the deed at the request of complainant; that his recollection is, complainant was to pay defendant \$480 on the first of October, 1885, and if he did so, defendant was to make him a deed at that time, and if complainant failed, he was to pay defendant \$150 rent for 1885.

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The defendant denies the transaction as stated by complainant, and swears that he paid the money with the understanding, that the land was to be his, but he agreed, afterwards, that if complainant would pay him \$480 on October 1st, 1885, he would sell and convey to him the lands, but failing, he was to pay \$150 rent for that year; that he did fail, and defendant rented the place to him for \$100 for 1886, and \$150 for 1887, and in the latter year he gave up the place to defendant, stating that he would not remain on it another year, for it. Thereupon, defendant told him he did not desire his place for less than its value, and he would surrender his rent claims,—amounting to about \$400,—his interest on the Merrill note,—about \$80,—and the \$480, at which complainant expressed himself satisfied, and in a short while moved off the lands.

One Armstrong testified for defendant, that he heard complainant say, he owed defendant and turned over the place to him for the debt, that he was unable to pay for it; that plaintiff also said, if he did not pay the purchase money, he was to pay rent.

J. L. Merrill testified, that he had signed a note as security for complainant for \$350 or \$400 to defendant, borrowed money, with which complainant made the first payment on the lands bought from said Boswell; that complainant stated, defendant was to pay Boswell the balance due on the land,—about \$400,—cancel the note for \$350 or \$400 held against complainant and witness for money borrowed to pay on said lands, and that the lands were to belong to defendant; but complainant also stated, that if he could raise the money defendant had paid to Boswell for him, defendant was to convey the lands to him.

Jno. S. Whittington for defendant testified, that complainant told him, that he had bought the place from Boswell, but could not pay for it and had never received a deed, and defendant had purchased it, and afterwards rented it to him for ten years, and being unable to pay the rent he was going to give it up to the defendant.

From the foregoing, it is seen that there is very great conflict in the evidence, upon the question at issue in this cause, as to whether this transaction is a conditional sale, or an equitable mortgage to secure a debt. As between complainant and Boswell, equity regards the trans-

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action as executed, and as operating to transfer the estate from the vendor, Boswell, and to vest it in the vendee, the complainant. "By the terms of the contract the land ought to be conveyed to the vendee, and the purchase price ought to be transferred to the vendor; equity, therefore, regards these as done; the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as the owner of the land."—1 Pom. Eq. Jur., § 368; 1 Story Eq. Jur., § 790; 2 *Ib.* 1212.

In equity, therefore, complainant is regarded as having had a perfect title to the land, and as between Boswell and defendant and complainant, in the conveyance by Boswell to defendant, the complainant was the real grantor. The evidence is without conflict, that Boswell had no contract of sale with defendant, and that he executed the conveyance at the instance, and by the direction, of complainant. Nor from the evidence are we permitted to doubt, that the \$400, which was paid by defendant to Boswell, as a part consideration for the conveyance, was paid for complainant as a loan to him, to enable him to fulfill his contract of purchase. The conveyance bears inherent evidence of the correctness of this conclusion. Complainant and J. A. Lee swear positively to the fact, Boswell's evidence is confirmatory of it, and the evidence of the other witnesses does not disprove it. Complainant gave his note for \$480 on the occasion to defendant. He says \$400 of this note was for the amount defendant loaned him,—a fact that Lee and Boswell's evidence strongly confirms,—and that the \$80 was the interest he charged him on it, at 20 *per cent. per annum*. It is coincident that \$400 was the balance due on the land, which the conveyance recites defendant paid, and \$80 is 20 *per cent.* on that sum for a year, the two making the exact sum for which complainant gave his note to defendant, and suggest the correctness of complainant's evidence as to the consideration of that note, especially since defendant offers no explanation of how the note happened to be for \$480. Why any note should have been given at all, if defendant's version of the transaction is correct, it is not easily understood, for the note recites that it is for value that day received by complainant from defendant, and the

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defendant says the agreement to resell the lands to complainant was verbal, entered into after the lands had been conveyed to him. It would have been more natural and far better, if defendant's account of the transaction is true, for it to have expressed the consideration defendant states it to have been.

From a careful review of the evidence, we ascertain that the relation of debtor and creditor did not exist between the complainant and defendant prior to the transaction we consider; that it began in a negotiation for a loan from the defendant to the complainant; that the negotiation ended in defendant advancing for complainant to Boswell the sum of \$400, for which complainant executed his note to defendant for \$480, payable October 1, 1885; that said note has been from that date to this a continuing debt in the hands of defendant against the complainant, on which he has been, and is liable to suit; that Boswell had no negotiation with defendant for the land, but executed his deed to him in the direction of complainant, in consideration of the payment by defendant for complainant of the balance due on the land; that the land was sold in the beginning and was conveyed for \$1,000, and that \$400, the sum defendant says he paid as a consideration for his conveyance, is in great disproportion to its real value. Affirming this, if any doubt remained as to the character of the transaction, we would resolve it in favor of its being security or equitable mortgage for a loan.—*Daniels v. Lowery*, 92 Ala. 521, 8 So. Rep. 352; *Knaus v. Dreher*, 84 Ala. 320, 4 So. Rep. 287; *Vincent v. Walker*, 86 Ala. 333, 5 So. Rep. 465; *Turner v. Wilkinson*, 72 Ala. 30.

The defendant does not deny that complainant procured him to pay the balance due by himself on the land to Boswell, and, according to his account of the transaction, the agreement was, that if complainant paid the \$480 in twelve months, he should have the property. Such a transaction is construed in equity to be a mortgage and not a conditional sale.—*Nelson v. Kellum*, 91 Ala. 574, 8 So. Rep. 690.

This case is not different in substance from that in *Parmer v. Parmer*, 88 Ala. 545, 7 So. Rep. 657. In that case, H. A. Parmer had bought the land from Mrs. Allen and had not received a conveyance. He induced her to convey, in absolute form, the same to H. K. Parmer.

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and took from the latter an agreement to reconvey the land to him, upon the payment of the debt. It was held to be a mortgage. Referring afterwards to this case, to distinguish it from cases which are here cited by appellant, it was said: "In equity, Parmer, the complainant, had a perfect title to the land; the conveyance was made at his instance, to secure his debt, and he was, therefore, the real grantor—all the title, equitably considered, which the defendant held came from complainant—and the stipulations between the parties, were the stipulations of the real grantor and grantee, and for the benefit of the former."—*Downing v. Woodstock Iron Co.*, 93 Ala 268, 9 So. Rep. 177. This language is precisely applicable to this case, to show the relations of complainant and defendant, and the effect of their dealings.

We find no error in the record and the decree of the chancery court must be affirmed. In stating the account ordered, it will be well for the register to ascertain and report to the court, the amount, if any, that may remain due and owing by complainant to H. T. Wimberly, on his mortgage to him.

Affirmed.

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Marengo County v. Lyles.

Action of Assumpsit against a County.

1. *Action of assumpsit against a county; when not maintainable.*—An action of assumpsit can not be maintained against a county, to recover the amount paid for the hire of a servant to keep up the fires in the county jail, and to supply it with water.

2. *When mandamus the proper remedy.*—When the sheriff or jailor seeks to be reimbursed for money paid for the hire of a servant to keep up the fires in the county jail, and to supply the jail with water, his claim must be presented to the court of county commissioners, and upon their failure to allow it, his remedy is by *mandamus*, to compel said court to make the proper appropriation.

APPEAL from the Circuit Court of Marengo.

Tried before the Hon. WILLIAM E. CLARKE.

This was an action of assumpsit brought by N. P.

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Lyles against Marengo county, and counted upon the common counts. The plaintiff's claim was based on his alleged right to be reimbursed for money which he had paid for the hire of a boy to pump water in the jail, and to keep up the fires therein during the winter months. By agreement the cause was submitted to the court without the intervention of a jury; and on the hearing thereof judgment was rendered for the plaintiff. Defendant appeals, and assigns this judgment as error.

JOHN C. ANDERSON, for appellants.

GEORGE W. TAYLOR, *contra*.

PER CURIAM.—It is the opinion of the court that the plaintiff has misconceived his remedy. He should first have presented his claim to the court of county commissioners, asking for the payment thereof; and upon their refusal to allow his said claim, he should then have asked for a *mandamus*, directed to said court of county commissioners, commanding them to make such appropriation as would be just and proper in the premises.

Reversed and rendered.

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138 312

C. A. Stern & Co. v. T. A. Collier et al. (Two Cases.)

Action of Assumpsit.

1. *Rulings on motion to vacate an order in a judgment entry; should be shown by bill of exceptions.*—Where a motion to set aside and vacate an order contained in a judgment entry is overruled, and an exception is reserved thereto, such ruling, to be reviewed by the appellate court, must be presented by a bill of exceptions and when the transcript contains no bill of exceptions, presenting for review such ruling, which is the only question intended to be presented, the appeal will be dismissed.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN R. TYSON.

These two cases involve identically the same questions

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and the records are in all respects similar, and they were, therefore, submitted together.

The suits were originally brought by the appellants, A. Stern & Co., against the appellees, and judgment was rendered for plaintiffs for a certain amount in each case. The judgment entries recited: "It being suggested at the estate of G. C. Collier, the intestate of T. A. Collier, was insolvent, it is ordered by the court that this judgment be certified to the probate court of this county, and no execution issue." There was a motion made by the plaintiffs in each case to set aside and vacate this order contained in the judgment entry, on several grounds. The motion was overruled, and it is stated that the plaintiffs excepted. These facts are gathered from the record proper, the transcript containing no bill of exceptions. The opinion of the court makes it unnecessary to state the facts of the two cases at greater length.

CHARLES WILKINSON, for appellants.

WILKERSON & HUBBARD, *contra*.

MCCLELLAN, J.—If the question intended to be presented in these cases was before us, we should probably hold that the circuit court erred in ordering that no execution issue on the judgments, and that they be certified to the probate court on the mere suggestion of defendant at the estate of his intestate "is insolvent." The fact that said estate had been *declared* insolvent should have been *pleaded*—not merely suggested—and proved.—Code, §§ 2250, 2251; *Dolberry v. Trite's Executor*, 49 Ala. 207; *Winningsham v. Lindsay*, 77 Ala. 510.

But the question is not presented by this record. We find in the transcripts motions to set aside the orders, details of the motions, and recitations that "moveant excepted." None of these matters belong to the *record* of the court below. They could only be made a part of the record for the purposes of appeals by bills of exceptions. Neither one of the transcripts contains a bill of exceptions. We are not allowed to consider these matters unless they are certified to us in the only way provided by law—incorporated in bills of exceptions, signed by the presiding judge and transcribed and certified to us by the clerk of the court.

No question being reserved, each of these appeals must be dismissed.

Costello v. Montague.

Bill in Equity for an Accounting and Settlement of a Partnership.

1. *Accounting and settlement of a partnership; when a reference is properly decreed.*—A bill was filed for an accounting between partners, and a settlement of the partnership after dissolution. The averments of the bill were not as definite as good pleading required, and no objection was made to the bill on this account; but respondent, in his answer, alleged that the partnership matters were so conducted that it was impossible to state an account approximately correct. The only evidence on this question was the testimony of the parties themselves, which, in some respects was irreconcilable. *Held*, that a decree ordering a reference was not erroneous, since upon such reference other evidence might be introduced, and a decree of confirmation would not be refused if the evidence taken upon the reference clearly shows a balance in favor of one partner; although it was impossible to make an absolutely correct statement of the account.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. W. H. TAYLOR.

The bill in this case was filed by W. H. Montague against C. H. Costello, and prayed for an accounting between the partners, and a settlement of a partnership, which had formerly existed between the complainant and the respondent.

The bill averred that W. H. Montague and C. H. Costello, in February, 1888, entered into a partnership for the purpose of carrying on a retail boot and shoe business in the city of Mobile; that the business continued until November 3d, when it was broken up by fire; that the firm debts had all been paid and the solvent accounts collected; and these facts were admitted by the defendant. It was shown that each partner was to get back what he put into the firm, and the balance was to be equally divided; that there was no partnership account kept, but each of the partners drew out money as he needed it, and that neither objected to this; that the insurance companies had paid them about \$15,000 for their loss, and that they realized about \$10,000 from the

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damaged goods, which were returned to them by the insurance companies. The bank account of the firm and many of the checks on such account subsequent to the fire were introduced. It was also admitted that there had never been any settlement of the partnership affairs. The defendant set up, as is stated in the opinion, that there had been an agreement between him and complainant that the partnership affairs should be considered as settled; and he also contended that there should be no decree of reference because the proof showed that no credit account could be stated.

On the final submission of the cause, on the pleadings and proof, the chancellor decreed that the complainant was entitled to the relief prayed for, and ordered a reference to the register to state and settle the account of the partnership transactions between the complainant and the respondent. The respondent appeals from this decree, and assigns the same as error.

GREGORY L. & H. T. SMITH, for appellant.—When the partners have kept their accounts so loosely that justice can not be done between them, the courts will not undertake to adjust the matter of difference for them.—*Fitzsimmons v. Foley*, 45 N. W. Rep. 364; *Nims v. Nims*, 1 So. Rep. 531; *Maupin v. Daniel*, 3 Tenn. Chan. (Cooper.) 223; *Marvin v. Hampton*, 18 Fla. 131; *Vermilion v. Bailey*, 27 Ill. 230; *Dale v. Hogan*, 39 Mo. App. 646; *Lanell v. Langell*, 20 Pac. Rep. 286; *Pomeroy's Eq. Jur.*, § 1405 and note; 2 Bates on Partnership, § 909; 7 Amer. & Eng. Encyc. of Law, p. 127 note 5; *Haynes v. Short*, 88 Ala. 566, 7 So. Rep. 157; *Glover v. Hembree*, 82 Ala. 328, 8 So. Rep. 251.

FAITH & ERVIN, *contra*, cited Lindley on Partnership, 112.

COLEMAN, J.—The main purpose of the bill was to compel a settlement of the partnership of Wm. H. Montague & Co., a firm composed of Wm. H. Montague and C. H. Costello. It alleges the dissolution of the firm, that there are no debts unpaid, and that there has never been a settlement of the partnership affairs. At the hearing the chancellor ordered a reference to the register to state an account of the partnership transactions be-

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tween the partners. This appeal was prosecuted from the decree ordering a reference. There was no demurrer to the bill, or objection for want of equity. The respondent Costello answered the bill, and in his answer, embodied a plea, to the effect, that, by mutual agreement, the parties between themselves had settled and closed the partnership matters. We agree with the chancellor that the evidence does not sustain the plea, and it is not insisted upon in argument. The real defense to the relief prayed is, that the partnership matters were so loosely and negligently conducted that it is impossible to state an account which will be approximately correct. On this point, no witnesses were examined except the parties themselves. In some respects their testimony is irreconcilable. But this condition of the evidence can not interfere with a proper determination of the disputed facts. There were certain presumptions of law, and rules as to burden of proof, which declare legal conclusions, in favor of the one or the other side, when the evidence is evenly balanced for and against a disputed fact. Cases have arisen where all the partners kept their accounts so loosely and confused that the courts refused to undertake to adjust their matters and to state an account between them, but it would require an extreme case to justify this conclusion in advance of an attempt to state the account. On a reference the register may receive other evidence than that before the court, when the reference is ordered, and a decree of confirmation will not be refused if the evidence should clearly show a balance in favor of one partner, because it was impossible to make a precisely accurate statement of accounts. 17 Amer. & Eng. Encyc. of Law, p. 1274.

The bill may not be as definite in its averments as good pleading requires, but it was not objected to on this account, and under the pleading and facts thus far disclosed in the record, there was no error in the decree ordering a reference.—*Glover v. Hembree*, 82 Ala. 324, 8 So. Rep. 251; *Haynes v. Short*, 88 Ala. 562, 7 So. Rep. 157.

Affirmed.

[Ex parte Jenks.]

Ex parte Jenks.

Application for Mandamus.

1. *Personal attendance by a woman as a witness compelled, although her deposition has been taken.*—The statute, (Code, § 2813), which provides that when the deposition of a witness, residing in the county in which the cause is pending, has been taken, if affidavit be made that the personal attendance of the witness is believed to be necessary, then such attendance shall be required, is applicable to and includes women whose depositions have been taken, as authorized by section 2801 of the Code.

Harriet E. Jenks filed her petition, addressed to the Judges of the Supreme Court, in which she averred that J. E. Loxley & Son recovered a judgment against William Turner and others in the city court of Mobile; that on said judgment a writ of garnishment was issued and served upon one Charles W. Stanton; that said Stanton as garnishee answered, admitting indebtedness to the defendant, but suggested that the moneys in his hands were claimed by the petitioner; that in a claim suit which was thereupon inaugurated, the petitioner, a female, who was a resident of Mobile county, was examined as a witness by interrogatories in writing, which were duly filed in said court, and copies of which were served upon the attorneys of record of the plaintiffs, Loxley & Son, as required by law; that her deposition was taken by a commissioner duly appointed, and that on a day during the term to which her deposition was returned, one of plaintiffs' attorneys made affidavit that he believed the personal attendance of the witness Harriet E. Jenks, (the present petitioner) upon the trial of the claim suit was necessary; and that thereupon the court made an order for the said Harriet E. Jenks to attend the said trial, which was duly executed upon the petitioner; that on a subsequent day of the same term of the court, the petitioner moved the court to annul and vacate the said order requiring her personal attendance, which motion was overruled and refused by the court. Upon these averments the petitioner prays that a writ of *mandamus* be issued from this court, directed to the judge of the

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city court of Mobile, commanding him to vacate, annul and set aside said order, requiring the petitioner's personal attendance upon the claim suit in said city court.

FRED'K G. BROMBERG AND BRICKELL, SEMPLE & GUNTER, for petitioner.

G. L. & H. T. SMITH, *contra*.

HEAD, J.—We have no doubt that section 2813 of the Code means to include females, residing in the county, whose depositions have been taken, as authorized by section 2801, in the class of witnesses whose personal attendance the court is authorized to require, upon the prescribed affidavit being made that such personal attendance is necessary. It is true that the depositions of persons residing in the county, other than females, taken in pursuance of said section 2801, are by force of section 2812, rendered *de bene esse* only, and can not be used if the statutory causes for which they were taken do not exist at the time of the trial, unless the witness be then dead, of unsound mind, or resides more than one hundred miles from the place of trial; while, so far as that section (2812) provides, the deposition of a female, though residing in the county and able to attend the trial, may be used. So far, it is the declared policy of the law that females shall not be required to attend the trial, but shall give their testimony by deposition. But section 2813 takes a step beyond, and engrafts an exception upon this general policy, which is, that if affidavit be made that the personal attendance of the witness, residing in the county, is necessary, then such attendance shall be required. In this provision there is no exception of females expressly made, and no good reason for holding that one was implied. The law considers the prescribed affidavit sufficient evidence that the personal attendance of the witness is necessary to the ends of justice; and that necessity may as well exist in case of a female as a male witness.

Application for *mandamus* denied.

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Mann et al. v. Hyams et al.

Bill in Equity to set aside as Fraudulent a Sale by an Insolvent Debtor.

1. *Decree upon demurrers; when insufficient to authorize appeal therefrom.*—An entry, “submitted for decree upon demurrers to the bill and demurrers sustained,” is not a decree sustaining the demurrers to a bill from which an appeal may be taken as provided by statute, (Code, § 3612); and when this is the only entry shown in the transcript of the docket entries of the chancellor, the appeal will be dismissed.

APPEAL from the City Court of Montgomery, in Equity.
HEARD before the Hon. THOS. M. ARRINGTON.

The bill in this case was filed by the appellants as creditors of Samuel Hyams, against the said Hyams and others; and sought to have set aside, as illegal, fraudulent and void, certain sales made by the said Hyams to other alleged creditors. The opinion renders it unnecessary to make a statement of facts.

RICHARDSON & REESE, for appellants.

TOMPKINS & TROY, ARRINGTON & GRAHAM, and A. A. WILEY, *contra*.—The supreme court has no jurisdiction of this cause. There is no decree contained in the transcript which would support an appeal.—Code of 1886, § 3612; *Ayers v. State*, 71 Ala. 11; *Wagnon v. Keenan*, 77 Ala. 519; *Joyner v. State*, 78 Ala. 448.

HARALSON, J.—The statute (Code, § 3612) authorizes an appeal to be taken from a decree sustaining or overruling a demurrer to a bill in equity. The appeal in this case purports to be taken from a decree of the city court sustaining a demurrer to the bill, and errors are assigned on such an alleged decree. But, on examination, we find no such decree in the record. In the transcript of the docket entries of the chancellor appears the following entry: “April, 18, 1893. Submitted for decree on demurrers to the bill, and demurrers sustained.” This is no decree, and, without one, an ap-

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peal does not lie to this court. The cause must be here dismissed.—*Bell v. Otts*, ante p 186, 13 So. Rep. 43; *Wagon v. Keenan*, 77 Ala. 519; *Joyner v. State*, 78 Ala. 448; *Ayers v. State*, 71 Ala. 11.

Dismissed.

CASES
IN THE
SUPREME COURT OF ALABAMA.

NOVEMBER TERM, 1893.

101 438
108 549

Strouse v. Leipf.

*action against a Married Woman to recover Damages for
Injury by a Dog owned by Her.*

1. *Pleas in bar and abatement; can not be pleaded together.*—Matters
abatement of a suit and facts constituting a bar to the action can
not be pleaded together.

2. *Pleading; error without injury.*—Where a defendant, under a plea
of the general issue, is entitled to make the same defense that could
have been made under a special plea to which a demurrer was sus-
tained, and on the trial evidence was introduced before the jury, and
the identical question sought to be presented by the special plea was
considered, error in sustaining the demurrer is error without injury.

3. *Duty of owner or keeper of ferocious animal; liability for injury in-
flicted by it.*—The owner or keeper of a vicious and ferocious domestic
animal, having knowledge of its vicious and ferocious nature and
habits, must safely and securely keep such animal, and his failure to
do so imposes liability for injury inflicted thereby.

4. *Husband and wife; statute securing wife's separate estate.*—Under
the common law, so long as the marital relation is maintained, the
husband is the head of the family, determines where the home shall
be, controls all things belonging to the household and premises, and
directs the economy and administration of domestic affairs; and our
statutes, securing to the married woman her separate estate. (Code,
2341-2356), have wrought no change in these relative rights and
duties.

5. *Same; effect of section 2345.*—The statute that declares that the
husband is not liable for a tort of the wife, in the commission of
which he did not participate, (Code, § 2345), provides a new remedy
for an actionable tort committed by the wife, and requires that action
therefor should be brought against the wife, but does not declare an
increased liability on the part of the wife for torts.

Same; action against wife for injuries caused by a dog owned by

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her.—Where a dog, which is owned by a married woman, and known to be ferocious and vicious, is kept on the premises owned by her, where she and her husband reside, and escaping therefrom inflicts injuries, the wrongful act is the keeping of the dog, and the husband, being the head of the family and having control of the premises, is liable for such injuries, and no action therefor can be maintained against the wife. (McCLELLAN, J. dissenting.)

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. JAMES T. JONES.

This action was brought by the appellee, Elizabeth Leipf against the appellant Estra Strouse, a married woman, to recover damages for defendant's negligently keeping a savage and ferocious dog, so that it escaped from the premises and inflicted the injuries complained of. The defendant pleaded a special plea in abatement, which is sufficiently stated in the opinion. The plaintiff demurred to this plea, on the ground that the fact that defendant's husband "controlled the dog kept by defendant, and controlled the premises upon which it was kept, does not relieve the defendant from liability for keeping said dog, and the injuries arising therefrom." The court sustained this demurrer, to which ruling the defendant duly excepted. The defendant then pleaded the general issue, and by special plea that the defendant teased and irritated the dog, and thus brought the injury on herself. Issue was joined upon these pleas.

Plaintiff was a servant living next door to defendant in the city of Mobile, a fence only dividing the premises where the dog was kept on the premises where defendant lived, she being a married woman, wife of Simon Strouse. In the rear of both premises, running through the square, was a common alley-way, used by all the families occupying premises abutting on the alley-way, to bring in wood, coal, family supplies, &c. There was a gate from the rear yard of defendant's premises opening into this alley-way. In this yard a watch dog was kept. On the evening of 21st of February, 1891, the plaintiff was in the alley-way emptying trash, and at the same time talking in a loud voice to a servant in a yard on the opposite side of the alley-way. The dog, hearing her voice, rushed out of the alley-way gate and attacked her, and she was severely bitten before she was relieved by the intervention of other persons. The defendant and her husband were not at home at the time, and the

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gate was left open by a visiting servant, who came to see the cook on the premises of defendant. The other facts of the case are sufficiently stated in the opinion.

Among the charges asked, to the refusal to give each of which the defendant separately excepted, were the following: (6.) "Defendant asks the court to charge the jury, that if they believe from the evidence that the defendant Estra Strouse and Simon Strouse are husband and wife, and resided together as such husband and wife, at the time plaintiff was injured by the dog, and that the dog was kept on the premises where they resided, then the husband was the keeper of the dog and they must find for the defendant." (7.) "Defendant asks the court to charge the jury, that if they believe from the evidence that defendant was at the time of plaintiff's injury a married woman, residing with her husband, Simon Strouse, on the premises where the dog was kept, then in law the husband was the keeper of the dog, and they must find for defendant."

There was judgment for the plaintiff, assessing her damages at \$2,500. The defendant appeals, and assigns as error the sustaining of plaintiff's demurrer to her plea in abatement, and the refusal to give the several charges asked by her.

OVERALL, BESTOR & GRAY, for appellant.—The evidence shows that the defendant was not the keeper of the dog, and, therefore, was not liable.—*Whittemore v. Thomas*, 153 Mass. 347. There is no evidence showing neglect or want of care by appellant or any servant or other person connected with the household in the keeping of the dog. At the time of the biting and injury to the appellee sued for, defendant was a married woman, and if there was any wrongful act in the keeping of the dog, the husband was the party liable, and not the wife. Code, § 2345; *Bibb v. State*, 94 Ala. 31, 10 So. Rep. 506; *Williamson v. State*, 16 Ala. 431; *Douge v. Pearce*, 13 Ala. 128; *Seibert v. State*, 40 Ala. 60; *Mulvey v. State*, 43 Ala. 318; *Lawson's Admr. v. Lay's Extr.*, 24 Ala. 184; *Quinlan v. People*, 6 Parker Cr. Rep. 9.

The defendant should have knowledge of the vicious propensity of the dog.—*Smith v. Causey*, 22 Ala. 571; *Durden v. Barnett*, 7 Ala. 169; *Woolf v. Chalker*, 81 Amer. Dec. 175; *Cooley on Torts*, pp. 342-4-5.

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GREGORY L. & H. T. SMITH, *contra*.—When a dog is shown to be of a ferocious character, and when it is shown that the character of the dog was notorious, the law charges the owner with notice, and requires her to keep the animal at her peril, and the keeping of such dog in a manner which makes it possible for it to escape and injure others, creates a liability upon the owner, as well as upon the actual custodian.—*Garlick v. Dorsey*, 4 Ala. 222; *Shearman & Redfield on Negligence*, 648, § 629 and note, also § 629 note 8, also 630, 631; *Whittaker & Smith on Negligence*, pp. 99, 100 and notes.

STONE, C. J.—This suit was brought by appellee to recover damages for alleged injuries suffered from the bite of a dog. The suit is against Estra Strouse, and the complaint charges that “the defendant kept, and for long time prior thereto had kept, a dog of savage and ferocious nature, and on, to-wit, the 21st day of February 1891, the defendant so negligently kept said dog that it escaped from the premises and attacked the plaintiff, and bit and tore and lacerated her, to her damage in the sum of * * *. The plaintiff avers that the defendant had notice of the savage and ferocious nature of said dog prior to the matters hereinbefore complained.” The complaint then claims special damages for being thereby disabled to perform customary work, for expense of medical treatment, and for necessary nursing. There is no claim of a specified sum as damages, sufficiently large to cover the recovery.

The defendant interposed a plea, sworn to, which is styled a plea in abatement. This plea was demurred to, the demurrer sustained, and this ruling is the subject of one of the errors assigned. The plea avers that when the act was done which gave rise to the suit “she was a married woman, the wife of Simon Strouse, who is now living in the city and county of Mobile, State of Alabama, that she was not at said time separated, or living apart from her said husband, but they were living together in conjugal and marital relations.” This clause of the plea does not negative the idea that the act complained of was solely the act of the wife. At common law this would have been a good ground of abatement. Under that system a suit could not have been maintained against the wife alone, on the facts charged in the complaint in this

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case. It would have been necessary to sue the husband jointly with the wife.—*Pinkston v. Greene*, 9 Ala. 19.

Our statute has changed the common law on this subject. Section 2345 of the Code declares that the husband is not liable for the torts of the wife, "in the commission of which he does not participate; but the wife is liable * * for her torts, and is suable therefor as if she were sole." This has changed the entire law as to the manner of suing a married woman, and has rendered it improper to join the husband, when the charge is that the wife herself committed the tort.—14 Amer. and Eng. Encyc. of Law, 647, and note 1 on pp. 648-9. The effect of our statute has been to render, in large degree if not entirely, the matter set up in the first part of this plea non-availing as a defense in abatement. Its whole scope, if available in any conditions, would seem to be confined to its effect as a bar to the action.

This plea has another averment, namely, "that the said husband was at said time, prior thereto and ever since, the head of the family and the household, and had control of the said dog and of the premises where the said dog was kept, and where said occurrence is said to have taken place." This averment is, in no sense, matter in abatement. If true, it is equivalent to the general issue, is a denial that the defendant kept the dog, and is a perfect bar to the action, if made good. Pleas in abatement and pleas in bar can not be pleaded together; and it may be that the latter averment would be construed as a waiver of the matter relied on in abatement. But we need not decide this. Defendant interposed the plea of the general issue, and under that plea was not only entitled to make all defense she could have made under the plea to which the demurrer was sustained, but she actually introduced proof, and had the jury pass on the identical question she had sought to present by the special plea. This, under all the authorities, cured the error, if any had been committed, in sustaining the demurrer to the latter clause of the special plea.

The doctrine is well settled that the owner or keeper of a domestic animal which is vicious and prone or accustomed to do violence, having knowledge of such violent disposition or habit, must safely and securely keep such animal so that it can not inflict injury. Whether or not there was special negligence in permitting the dog's es-

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cape from the premises, is not the inquiry. The keeper must at his peril safely keep such animal. Such is the condition on which the ownership or custody of known vicious animals is tolerated. Ownership or custody of such vicious animal is not one of the natural, inherent rights of property. It is a qualified, or restricted right. Qualified by the condition that the animal can be and safely confined and kept.—Cooley on Torts, 343 *et seq.*; 1 Addison on Torts, § 261; Whittaker's Smith on Negligence, 99; 2 Shearman & Redf. on Neg., §§ 628, 631; 1 Lord Derby, 17 Fed. Rep. 265; 1 Amer. & Eng. Encyc. of Law, 581; *Garlick v. Dorsey*, 48 Ala. 222; *Nolan v. Traber*, 49 Md. 460.

Previous knowledge of the animal's vicious habits must be alleged and proved; but positive proof is not always necessary. It may be inferred from circumstances. But the knowledge of the vicious habits of an animal need not refer to circumstances of exactly the same kind. All that the law requires to make the owner or keeper liable is knowledge of facts from which he can infer that the animal is likely to commit an act of the kind complained of.—1 Amer. & Eng. Encyc. of Law, 582 *and* note.

The pivotal question in this case is, whether Mrs. Strouse, the wife of Simon Strouse, living in the same house and in marital relations with him, can, under the facts of this case, be adjudged guilty of the tort complained of. Let us first ascertain precisely what was done which led to the plaintiff's alleged injury, or shed light on the circumstances attending it. We premise that what is here stated is proved by all the testimony bearing on the question or questions, without a shade of semblance of conflict. The house and premises in which Mr. and Mrs. Strouse lived together as husband and wife was the property of Mrs. Estra Strouse, the defendant in this suit. They lived there as husband and wife, having their children around them, and had lived at the same place for many years. A dog had for years been on the premises, not otherwise confined than by the inclosure of the lot. In the day time, when neither Mrs. Strouse nor her husband was at home, the dog escaped through the back gate of the lot, and inflicted the injury complained of in an open, public alley-way which extended across from street to street at the rear of the

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premises. No special act of negligence—in fact, no direct agency—is charged either against Simon or Estra Strouse, in immediate connection with the escape of the dog at the time it took place. The immediate cause, according to the testimony, was the act of a visiting stranger. But, as we have shown above, negligence in permitting the dog to escape from the inclosure was not essential to the maintenance of this action. The fault and liability for the injury which ensues are established, according to legal requirements, when it is shown that a vicious animal, prone, and known to be prone, to inflict personal injuries, is kept, and such animal escapes from confinement and inflicts injury. This constitutes an actionable tort, perpetrated by the keeper of such animal. That there was testimony tending to prove the vicious, if not dangerous nature and temper of the dog, and tending to charge his keeper with a knowledge of such his evil disposition, can not be gainsaid. A verdict, finding such to be the fact, could not be set aside as unsupported by testimony.

The testimony as to the ownership, custody or keep of the dog was as follows: Plaintiff testified: "It was Mrs. Strouse's dog. She would go to the butcher wagon and ask for meat for the dog. She got the dog from Mr. Hayes, who is now dead. I heard Mrs. Strouse say that Mr. Hayes gave her the dog when it was a small puppy. Mr. Strouse's cook fed the dog. I do not know who took care of him." This was the entire testimony for plaintiff on this question. For defendant, Strouse and his wife testified that Hayes or Haas gave the puppy to Mr. Strouse, that he had always owned him, and gave directions as to his being fed. Their two children and the cook confirmed them in this testimony. It is not our intention to compare the relative weight of this conflicting testimony.

The authorities are uniform that the husband is the head of the family, so long as the marital relation is maintained. He determines where the home shall be, is entitled to the wife's labor and services, has the right to have her society, controls the home and the household, and, with limited exceptions, she must obey his commands. In domestic management she is not presumed to have an independent will of her own. And our statutes, securing to married women their separate estates, have

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wrought no change in these relative rights and duties that affects the questions presented in this case. In *Hanberry v. Hanberry*, 29 Ala. 719, it was said: "It is settled law that the domicil of the wife follows that of the husband." In *Firebrace v. Firebrace*, Law Rep. 4 Prob. Div. 63, 67, it is said: "The domicil of the wife is that of the husband." This was said in 1878, after the enactment of the married woman's act in England. In the matter of *Cochrane*, 8 Dowl. Prac. Rep. 630, 635, Coleridge, J., replying to the contention "that the wife, as to her residence and manner of passing her time, was independent of her husband," said: "But our law has not so limited his rights, nor rested them on so narrow a foundation. Although expressed in terms simple almost to rudeness, the principle on which it proceeds is broad and comprehensive. It has respect to the terms of the marriage contract, and the infirmity of the sex. For the happiness and honor of *both* parties it places the wife under the guardianship of the husband, and entitles him, for the sake of both, to protect her from the danger of unrestrained intercourse with the world, by enforcing cohabitation and a common residence." In the same opinion he quoted Lord Mansfield as saying, "The husband has, in consequence of his marriage, a right to the custody of his wife, and whoever detains her from him violates that right, and he has a right to seize her wherever he finds her."

In *Ashbaugh v. Ashbaugh*, 17 Ill. 476, the court said: "In contemplation of law the husband and wife are one person, and her residence follows that of the husband." This principle was re-affirmed in *Davis v. Davis*, 30 Ill. 180, and in *Kennedy v. Kennedy*, 87 Ill. 250. In *Elijah v. Taylor*, 37 Ill. 247—a case controlled by their statute securing to married women the ownership of their property—the court employed this language: "We desire to proceed cautiously in the construction of that act, because although passed without much consideration, it involves interests of great magnitude, and questions of no little difficulty. All that we deem it necessary to say, in regard to the case before us, is this: that where the husband, as the head of the family, occupies and cultivates the land of the wife, he must be considered as occupying it with her consent, for the common benefit of the family; and the products of his toil upon such land, are as much

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property, notwithstanding the act of 1861, as if he had occupied, as a tenant, land rented from some third person. Any other rule would plainly lead to great confusion, and open a wide door to fraud."

In *Boyce v. Boyce*, 23 N. J. Eq. 337, 348, the principle was thus expressed: "The wife is bound to follow her husband when he changes his residence, even without her consent, provided the change is made by him in the bona fide exercise of his power, as head of the family, of determining what is the best for it."

In California the rights of the wife to the ownership and control of her property were never framed after the common law model. They partook more of the civil law system. In *Hardenbergh v. Hardenbergh*, 14 Cal. 654, is this language: "The husband, being the head of the family, and bound for its support and maintenance, may change the matrimonial domicile at pleasure, and it is the duty of the wife to submit to the reasonable exercise of his right."

The case of *Glover v. Alcott*, 11 Mich. 470, arose after the enactment of their statute securing to married women the ownership and control of their property. The wife had permitted the husband to conduct a large business, calling himself "W. W. Alcott, agent." Indebtedness was incurred in the conduct of the business, and some barrels of flour, the product of the enterprise, were seized and sold in payment thereof. The wife brought an action of trover for their conversion. In discussing the question of her right to maintain the action, the court, Christiancy, J., said: "We see nothing in the statute to satisfy us that the legislature contemplated so radical a change in the legal relations of husband and wife, while they continue to live together, and he is competent to transact the transaction of business, and guilty of no gross neglect of his duties to her and his family. But the husband must, as a general rule, still be regarded as the head of the family, and as the only one of the two authorized to carry on such general trade and business." In Massachusetts, they have legislation somewhat analogous to ours, relating to the rights of married women in their separate property. In *Com. v. Wood*, 97 Mass. 225, the husband was indicted for keeping a house of ill fame. The house was the separate property of the wife. The defense relied on and ruled upon is shown in

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the following extract from the opinion of the court: "The defendant contends that he is not liable, because the house was owned by his wife as her separate property, and the business of keeping a house of ill fame therein, which was resorted to for prostitution and lewdness, was carried on by her, and she took the profits thereof, and he did not participate in them. Whether he is liable in such a case must depend upon the relations which he sustains to the household, while he lived with his wife as her husband.

"The doctrine of the common law is, that by marriage the husband and wife become one person in law; that she is under his protection, influence, power and authority, and that he is the head of the household. This condition of the wife is designated by the expressive term *coverture*. One effect of it is, as a general rule, though subject to many exceptions, to excuse her from punishment for many crimes committed by her in the presence of her husband, on the ground that she acted under his compulsion. He alone is held responsible for such crimes. [Citing many authorities.] How far he may exercise force in restraining her is not precisely settled. But there can be no doubt that he may exercise as much power as may be reasonably necessary to prevent her as well as other inmates of the house from making it a brothel. It is said in Dalton's Justice, that he is liable if she keep an ale-house without license against his will.

"But it is contended that the recent legislation of this Commonwealth has made married women so far independent of their husbands as to release the defendant, in such a case as the present, from all responsibility for the conduct of his wife. It is true, that the house they lived in appears to have been owned by her to her sole and separate use, free from the control of her husband. But ever since the law of equitable trusts existed, married women have been able to hold property thus independently of the husband's control; and the fact that the family lived in a house they owned has never been regarded as affecting the rights and power of the husband, as head of the family. * * * * These provisions of the statute relate to legitimate business, and not to the keeping of brothels. They do not take away his power to regulate his household, so far as to prevent his wife from committing this offense, or relieve him from responsibility

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it is committed." See also *Com. v. Flaherty*, 140 Mass. 454.

A misdemeanor or tort committed by a married woman conjointly with, or in presence of her husband, is presumed to be his act, because the law raises the presumption that she acts in obedience to his will, or under his coercion. The same rule applies as to crimes, except a few of the higher grades.—*Douge v. Pearce*, 13 Ala. 127; *Williamson v. State*, 16 Ala. 431; *Lawson v. Lay*, 24 Ala. 34; *Mulvey v. State*, 43 Ala. 319; *Quinlan v. People*, 6 Barker Cr. Co. 9; Cooley on Torts, 115. "There is a presumption," says Judge Cooley, "corresponding to that which is made in the criminal law, that if a wrong committed by the wife in the presence of the husband, must have been committed by his consent and under his influence, and consequently, is his wrong rather than that of the wife, and should be redressed in a suit against him alone. But any such presumption is liable to be overthrown by evidence." See also *Carleton v. Gaywood*, 49 N. H. 314.

This same learned author, Judge Cooley, p. 118, says: "It is not very clear how far the law of torts has been modified." He was speaking of the influence exerted by the statutes by which married women have been given independent power to make contracts and to control property. Continuing, he says: "We should probably be safe in saying that so far as they give validity to a married woman's contracts, they put her on the same footing with other persons, and when a failure to perform a duty under a contract is in itself a tort, it may doubtless be treated as such in a suit against a married woman. The same would probably be true of any breach of duty imposed upon a married woman as owner of property which she possesses and controls the same as sole and unmarried."

We have referred to our statute which authorizes suits to be brought against the wife alone: Section 2345 of the Code of 1886. That section in its entirety reads as follows: "The husband is not liable for the debts or engagements of the wife, contracted or entered into after the marriage, or for her torts, in the commission of which he does not participate; but the wife is liable for such debts or engagements entered into with the consent of her husband in writing, or for her torts, and is suable therefor, as if she were sole."

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All who are familiar with the principles of the common law will readily perceive, and take in a large field for the operation of this statute. Under that system, a wife could make no contract or agreement which, as such, would authorize an action and recovery against her. Under the statute, if she enter into a contract or agreement with the written consent of her husband, an act for its breach may be maintained against her alone. Nor could she be sued alone, under common law rules, for any tort committed by her, no matter how wrongful, violent, or independent of presumed marital restraint her conduct may have been. Under that system, if the tort was committed in the presence of her husband, *prima facie*, it was not her tort, but was presumed to have been the work of her husband's coercion. For such act, unless it was affirmatively shown that she acted independently of her husband's will, she could not be sued, even conjointly with her husband. It was his tort, and his alone, and he alone was suable for it. If she committed a tort in the absence of her husband, or, if present, if it was affirmatively shown that she acted of her own will and independently of his, then she could be sued, but the suit could only be maintained against her and her husband jointly. In this last class of cases, the statute has changed the law to this extent: It is now neither proper, nor permissible to join the husband as a defendant, in an action for a tort committed by a married woman, "in the commission of which the husband does not participate." That is, in those cases of tort by the wife in which, at common law, the husband and wife could be jointly sued, the wife, under the statute, may and must now be sued alone. There was no intention to change the domestic relations between husband and wife, or to revolutionize the economy which pertains to that domestic relation. The statute relates to remedies. It confers a remedy for the enforcement, or breach of a contract or agreement, which itself had authorized a married woman to enter into; and a new remedy for an actionable tort committed by her. For either of these she must be sued alone. There is not a word or syllable in the statute which gives intimation of an intention to declare and fasten an enlarged liability for torts. It compasses all its ends, and gives effect to its every provision, when it transfers the burden from the joint

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shoulders of husband and wife, and places it on the wife alone. We repeat, so far as it relates to torts, it deals with the remedy, not the liability. We do not doubt that a married woman may commit a tort, even in the presence of her husband, for which an action may be maintained against her individually and separately. Personal violence, or any other active wrong, showing that it was prompted by her personal will, passion, wantonness, or recklessness, would fall within this class. Proof of such self-prompted action would overcome the presumption of marital restraint, or coercion.— *Carleton v. Haywood*, 49 N. H. 314.

Let us recur to the facts of this case. The dog had been on the premises for several years. No present act of negligence is charged against husband or wife which led to the escape of the dog, and consequent injury of the plaintiff. The fault charged was and is, that a dog with known vicious propensity was kept on the premises, and that escaping therefrom, he inflicted the injury complained of. The wrongful act was the keeping of the dog. This pertained to the government of the household and premises, the economy and administration of the domestic affairs. It was not the act of a moment, or the work of an hour or a day. It was continuous in its nature, and must be charged to the account of the head, the governing head of the family. For this injury no suit could have been maintained at common law against the husband and wife jointly. It would have been adjudged to be his act, his wife, at most acting conjointly with him, and under his presumed control. Nor has the statute wrought any change in this bearing of the question. If the wife had any part or lot in the keep of the dog, it can not be classed as her tort, "in the commission of which he did not participate." She could not keep the dog without his consent and participation. Hence the case is not brought within the provisions of the statute.

A further argument. Let us suppose the husband had been sued, and he had pleaded in bar that the wife owned and kept the dog. Every one will say such defense would be frivolous. The husband, the head and governor of the family must be held accountable for the economy and administration of the household. This power and right have not been taken away or im-

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paired by the statutes securing to married women their separate estates.

We are aware that we have given to this subject a somewhat extended consideration. We have done so because it brings before us, for the first time, the inquiry, to what extent, if any, our married woman's laws have changed the relations of the husband to the household and its government. We have felt that so grave a question should not be slurred over, but should be clearly and definitely settled. And notwithstanding our statutes have revolutionized the property rights of the wife, they have effected no change in the headship, the dominion and control of the husband over the household, or in the government of the home and its appurtenants.

Charges 6 and 7 asked by defendant are in strict accord with the principles we have declared, and each of them should have been given. We need not consider any other rulings.

Reversed and remanded.

McCLELLAN, J. dissenting.

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Action for the Breach of a Contract.

1. *Unilateral contract; when made valid.*—A contract, though void when made for the want of mutuality of obligation, becomes valid and binding, upon the performance by the promisee of that in consideration of which said contract was made.

2. *Contract of purchase and sale may become binding though unilateral when made.*—A contract of purchase and sale, conditioned upon the seller being able to have certain things done, though void when made because unilateral and imposing no enforceable obligation on the part of the seller, becomes valid and mutually binding upon the seller being able to have done the things, upon the performance of which the contract was conditioned.

3. *Same.*—Where an agreement in writing evidences a sale and purchase of a certain quantity of coke at a specified price, provided the

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seller is able to induce coke manufacturers to build ovens and make a certain portion of the stipulated amount of coke, and provides for notice by the seller at various times mentioned as to how much of the entire quantity of coke can be supplied during certain specified periods, and recites that the conditions of sale, binding the buyer to take the coke as specified and giving the seller the option to furnish it, are entered into to enable the seller to induce the manufacturers to build sufficient ovens by promising a certain sale of their product at a fixed price, the seller obligating himself to use his best endeavor to accomplish this end,—though at the time made such agreement was unilateral, imposing no enforceable obligation on the seller and, therefore, not binding on the buyer, when the seller induces the manufacturers to build ovens sufficient in number to produce the requisite quantity of coke, the unilateral agreement is converted from a conditional and optional one into a mutually binding contract, imposing mutually enforceable obligations on the parties thereto, for the breach of which suit can be maintained.

4. *Agency*.—Where a contract of sale and purchase of a certain quantity of coke is made between a furnace company and a coke company, upon condition that the coke company is able to induce coke manufacturers to build ovens sufficient in number to produce the requisite quantity of coke, and it is provided therein that the coke company will give notice to the furnace company as to how much of the entire quantity of coke can be supplied during certain periods, it being stated in said contract that such conditions are made to enable the coke company to induce the manufacturers to build the necessary ovens, for the accomplishment of which the coke company is to use its best efforts, there is no relation of principal and agent between the two companies; the coke company is in no sense the agent of the furnace company to purchase coke from the manufacturers for the latter company's benefit, but is the seller of the coke on its own account.

5. *Custom and usage; admissibility of evidence thereof*.—Evidence of custom and usage is not admissible to explain or extend the meaning of a written contract, unless the terms of such written contract are ambiguous and uncertain.

6. *"f. o. b."; judicial knowledge*.—Courts judicially know that "f. o. b." in contracts of sale, where the property sold is to be transported, mean, "free on board" the cars at a certain place named in the contract.

7. *Same; evidence of custom and usage*.—Where a contract of sale specifies the price of the article sold, "f. o. b. cars" at a certain place of destination, named in the contract, parol evidence of the custom and usage as to the payment of freight on the particular article sold, which would give to the terms a different meaning or operation than would have attached had the words of which they are the initials been originally inserted in the contract, is inadmissible; in such a contract the price stipulated is for the articles free on board the cars at the place of destination, and does not impose upon the buyer the duty of paying the freight thereon.

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8. *Charge to the jury.*—Where, in an action against the buyer for the breach of a contract of sale of coke at a certain price per ton, “f. o. b. cars, Sheffield, Alabama,” there is evidence tending to show that after making the contract the buyer agreed to pay freight on shipments as received, and thereafter paid freight for a considerable period for all coke which was delivered to it, without objection, a charge instructing the jury that “according to the written contract between the parties, the Hull Coal & Coke Company [the seller] was bound to pay the freight on the coke to Sheffield, and the defendant was not bound to pay the freight, and if the defendant, at the instance and request of the plaintiff voluntarily paid the freight up to the 1st of July 1888 [the time of the last shipment] this did not bind them to pay the freight afterwards, nor exempt the plaintiff from the obligation to pay freight,” is free from error, and should be given; the question is to whether the original contract, in respect to the payment of freight, was changed by a subsequent binding agreement between the parties, being a question for the determination by the jury from the evidence.

9. *Contract of sale; reduction of freight rates.*—In a contract of sale for a stipulated price at a certain place of delivery, a provision “that it is understood that” the seller has freight rates to the point of delivery, “on which the above price is based, but if, during the time this contract is in force this rate should be advanced, then the buyer has the option to take any undelivered portion due on his contract at the advance, or of cancelling it provided the seller does not elect to stand said advance,” does not entitle the buyer to the benefit of reductions of freight rates accruing after the execution of the contract and while it was being performed.

10. *Renunciation of contract; waiver thereof.*—Where a party to a contract offers to waive a renunciation of said contract by the other party on certain conditions, but the latter refuses to accept such offer, the party renouncing can not complain if the other party does not finally accept and act upon the original renunciation.

APPEAL from the Circuit Court of Colbert.

Tried before the Hon. JAMES B. HEAD.

This action was brought by the appellee corporation against the appellant corporation, to recover damages for the alleged breach of a contract, for the sale of a large quantity of coke. The contract, which is the basis of this suit, and which was set out in the complaint, is copied at length in the opinion; and the defenses which the defendant interposed by several different pleas are sufficiently stated in the opinion.

Upon the examination of Alfred H. Moses as a witness, after testifying, in reference to the furnace company paying the freight on the coke when delivered, that he did not make any objection to it when he

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first heard thereof, but afterwards both in conversation with and by letter to Mr. Hull he did object to the furnace company paying the freight at the time of the delivery of the coke, he was then asked: "At any time did you admit, in any way, that it was proper for the furnace company to pay the freight?" The plaintiff objected to this question, the court sustained the objection, and the defendant excepted.

Upon the examination of Edward Doud, as a witness for the defendant, he testified that he was at the time the superintendent of blast furnaces at Sheffield, Alabama, one of which formerly belonged to the Sheffield Furnace Company; that he had had much experience in the management of furnaces, and had, at different times, attended to the purchase of coke for them. He further testified that he did not know the custom of the Hull Coal & Coke Company as to paying freight on coke shipped, but that he knew the general usage and custom of the coke trade. The witness was then asked: "Was there any general custom in the coke trade in this section of the country [at the time the contract with the plaintiff was made], * * * * as to which party should pay freight when the contract was to deliver the coke at a fixed price, f. o. b. cars at the point of destination?" The defendant objected to this question, upon the grounds that it was illegal, "and it calls for testimony in conflict with the instrument of writing sued on, which was not necessary or proper to interpret any of the words in said instrument, and because witness has not shown that he is competent to speak of any custom which can control the meaning or interpretation of this contract." The court overruled this objection, and the defendant duly excepted. In answer to said question the witness replied, that by such custom the buyer paid the freight, and sent the freight bills to seller for buyer's credit on the contract price,

Upon the examination of George H. Hull, in rebuttal, he testified that he had been engaged in the coal and coke business about nineteen years at Louisville, Kentucky; and had dealt in many different brands of coke, including the brand mentioned in the contract sued on. He was then asked the following question: "Did you know the custom of the coke trade existing on, or prior to August 30, 1887, [the date of the execution of the con-

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tract sued on] in relation to the payment of freight when coke is sold at a fixed price f. o. b. cars at a place of destination?" To this question he answered that he did. He was then asked, "What was the custom of the coke trade under such conditions, and what was it in August, 1887?" The defendant objected to this question, on the grounds specified in the objection to the question asked the witness Doud. The court overruled the objection, and to this ruling the defendant duly excepted. The witness answered, the custom is and was at that time, "that buyers should pay freight, deduct it from the invoice, and send the freight bills to sellers of the coke for credit." A similar question was asked the witness W. H. Allyn, and the court overruled the same objection interposed by the defendant, and to this ruling the defendant duly excepted.

There were many objections interposed by the defendant to the introduction in evidence of the correspondence between the plaintiff and the defendant, and the defendant duly and separately excepted to the overruling of each of these objections by the court. Such other facts as are necessary to an understanding of the decision in this case are sufficiently stated in the opinion.

The defendant separately excepted to each of the following separate portions of the court's oral charge to the jury: (1.) "The court further charges that the defendant was not entitled under said written contract, unless it was subsequently changed, to the benefit of any reduction, which might be made in the rate of freight from the ovens to Sheffield, and that unless the contract was modified by the subsequent agreement of the parties, as I shall presently explain to you, the plaintiff was entitled, under said contract, to the sum of five dollars and ten cents for each ton of coke delivered under said contract, without regard to whether the freight was afterwards at any time less than it was at the date of the contract." (2.) "That the contract offered in evidence by the plaintiff, dated August 30th, 1887, is not invalid by reason of any want of mutuality in its binding effect on the several parties thereto, if according to the terms of the contract the plaintiff arranged for the supply of coke it was to deliver to defendants, when they did so arrange, they became bound by their contract to deliver the coke, as it stipulated to do, to defendant, and defend-

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dant could have enforced the contract against the plaintiff, or have recovered damages from the plaintiff, if it had failed to observe said contract." (3.) "There are in truth so far as the right of recovery is concerned, but two questions of fact for the jury to determine. If either one of these should be determined by you according to the contention of the plaintiff, then the plaintiff would be entitled to recover in this suit; but before you could find for the defendant, you would have to determine both of these questions or issues of fact, according to the contention of the defendant. The first question is: Whose duty was it under the contract, as ascertained by you from the evidence, to pay the carrier the freight on the coke shipped from the ovens to the defendant at Sheffield, that of the plaintiff or of the defendant? The next question is: Was there, at any time after the contract was entered into, an agreement made by these parties, by which they changed the contract, so that the defendant became entitled to the benefit of any reduction in freight rates on said coke, which might be secured from the railroad company, or companies transporting the coke?" (4.) "If you find from the evidence that by the contract as read in the light of the custom or usage, if such existed, for which I have permitted evidence to be introduced before you, or by the course of dealings established by the parties, or by the agreement of the defendant, as shown by the correspondence taken in connection with the other evidence, if under all the evidence such was the agreement, and such correspondence was binding on defendant, it was the duty of the defendant to pay the freight on the coke received by it, when it was received and afterwards to have a credit on the fixed, or contract, price of five dollars and ten cents per ton, for the freight paid thereon; then I charge you, your verdict must be for the plaintiff for some amount, whatever that amount may be under the instructions yet to be given you by the court as to the measure of damages." (5.) "If then you should find from the evidence, that is, from the contract, taken with the testimony which I have allowed to go to you, as to the custom in the coke trade, or the course of dealings between the parties, or the correspondence by letter and telegram, that it was the duty or agreement of the defendant to pay these freights on the coke, as they took the cars from the railroad company,

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then they broke the contract on the 23d day of July, 1888, because then they say, by the telegram of that date, that they 'are released from the contract, and will no longer be bound by it.' This was a breach of the contract by them, if they should have paid the freight, and the plaintiff was not required to proceed any further in the fulfillment of the contract, but could treat it as ended then by such breach, and if you find that such duty was on the defendant as to payment of freights, then by their statement that they would no longer be bound by the contract, the plaintiff is entitled to maintain this action, and recover damages from the defendant in this suit.'

(6.) "How will you ascertain whose duty it was to pay the freight on this coke? I charge you that the language of the contract of August 30th, 1887, is ambiguous, in relation to the payment of the freight, and uncertain in its terms as to who was to pay it, and for that reason the law says, you may have the aid of other evidence than the contract itself to explain that ambiguity, and I have permitted evidence to be given in the case as to the general custom, existing between buyers and sellers of coke on that subject, so that you may ascertain whether there was a custom in that trade, so general in its application and so well known in that trade, that persons dealing in buying and selling coke to be shipped to the buyer, may be presumed to have contracted with reference to that custom, and if there was such a custom, of such general application, then, I charge you that the law makes that custom a part of the contract, and that when the contract is ambiguous, as in this instance, it is to be read by you, as if the custom was incorporated into the contract." (7.) "If you find that such custom existed, and that it became the duty of the defendant to pay the freight, then I charge you that by refusing to do so, in the telegram of July 19th, 1888, and the telegram of July 23d, 1888, the defendant broke the contract; and that the plaintiff is entitled to recover such damages as it may show to have sustained by reason of such breach or violation of said contract by defendant." (8.) "Was there any agreement, subsequent to the making of the contract, by which it was agreed between these parties that the defendant should have the benefit of any future reductions in freight? Bear in mind, what I have already stated to you, that, if you find from the evidence

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was the duty of the defendant to pay the freight, it would become unnecessary for you to answer this question, in order to find for the plaintiff. But if you should find that the plaintiff should have paid the freight, then in order to return a verdict for the defendant, you must also find, that there was an agreement between the parties that the defendant should have the benefit of such freight reductions." (9.) "The defendant has offered in evidence certain letters from its president, in which the statement or declaration is made, that such agreement for the reductions had been made by plaintiff, and claims that by the failure of plaintiff to deny such statement, it was an admission of the truth of such statement. Well, the law is that, if a person makes a statement to another concerning a business transaction, under such circumstances, that it is incumbent on him to deny, or he would naturally deny the truth of such statement, if it were untrue, and he does not deny it, then it may be construed into an admission by such party that the statement is true; but if preceding such statement and failing to deny it, the same statement had been made to plaintiff by the defendant, and by plaintiff denied to defendant, there would be no necessity for plaintiff to again deny a repetition of the statement, because persons are not required to deny back and forth statements as often as they may be made, when the matter is already denied and at dispute. There would be no sense in that, it would be child's play." (10.) "On the question of the amount of damages, it would be proper for you to consider, whether the agreement was made to allow the defendant the benefit of the future reductions in freight, and if you find from the evidence that such agreement was made, and you find for the plaintiff, then the amount of plaintiff's recovery would be reduced by the amount of any reductions which you may be satisfied from the evidence has been made in such freights since said agreement."

The court, at the request of the plaintiff, gave, among others, the following written charges: (1.) "If the jury believe from the evidence that it was the duty of the defendant to pay the freight, and further believe that defendant refused to pay the freight, and broke the contract, because the plaintiff would not pay said freight, then plaintiff is entitled to recover in this suit such

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damages as it has sustained, even if the jury should believe that there was a verbal agreement that defendant should have the benefit of reduced rates of freight." (3.) "If the jury believe from the evidence that defendant broke the contract by a refusal to pay freight, and further believe that there was a verbal contract by which the defendant was to have the benefit of freight reduction, then the measure of plaintiff's recovery would be the difference between the contract price as shown by the written agreement and the price of coke at Sheffield at the time the contract was broken, *deducting* therefrom the amount of freight reduction from \$2.85 per ton as may be *shown by the evidence*." (4.) "If the jury further find from the evidence, that, it was the general custom in the coke trade, for the purchaser to pay freight, and that the superintendent of the defendant in this cause knew of the existence of such custom, when he executed the original contract in this cause, and that thereafter the defendant paid the freight and continued to do so for some time, then it became the duty of the defendant to pay the freight, and the defendant had no right to abandon the contract, because the plaintiff refused to make such payment; and, if the defendant abandoned said contract under these circumstances, then said contract was broken by the defendant, and your verdict should be for the plaintiff."

The defendant separately excepted to the giving of each of the charges requested by the plaintiff, and also separately excepted to the court's refusal to give the following charge, among others, requested by it: (1.) "According to the written contract between the parties, the Hull Coal & Coke Company were bound to pay the freight on the coke to Sheffield, and the defendant was not bound to pay the freight, and if the defendant, at the instance and request of the plaintiff voluntarily paid the freight up to the 1st of July, 1888, this did not bind them to pay the freight afterwards, nor exempt plaintiff from the obligation to pay freight."

There was judgment for the plaintiff, assessing its damages at \$35,000. The defendant brings this appeal, and assigns as error the several rulings of the trial court to which exceptions were reserved.

BROOKS & BROOKS and ROULHAC & NATHAN, for appell.
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lant.—The written instrument sued on in this action was not an absolute valid contract of sale, it was a conditional contract of sale. It did not embody the elements necessary to constitute a valid sale, which are as follows: (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised. It was a conditional sale.—*Williamson v. Berry*, 8 How. (U. S.) 544; *Wittkowsky v. Wasson*, 71 N. C. 451; *Shealy v. Edwards*, 73 Ala. 175; *Pilgreen v. State*, 71 Ala. 363; *Tiedeman on Sales*, § 200.

The clause in the contract “provided the Hull Coal & Coke Company are able to induce the operators to make coke for 3,700 cars of the above amount,” makes the alleged contract of sale provide what the coke company shall receive for a *contemplated act*, but imposes no obligation on it to do the *act*. This results in making the contract unilateral, and therefore invalid. It is indispensable to the legal validity of a contract that it should be mutually obligatory upon both parties or it will be binding upon neither of them.—*Branch Bank v. Steele*, 10 Ala. 925; *James v. Stiggins*, 13 Ala. 835; *Evans v. C. S. & M. Railway Co.*, 78 Ala. 345; *Wilks v. Ga. Pac. R. R. Co.*, 79 Ala. 180; *Borst v. Simpson*, 90 Ala. 373, 7 So. Rep. 814; *Chitty on Contracts*, 3; 1 *Addison on Contracts*, § 18; *Bishop on Contracts* (Enlg. Ed.) §§ 77, 78; *Benj. on Sales*, § 41; *Hunt v. Wyman*, 100 Mass. 198; *Rutledge v. Grant*, 4 Bing. 653; *Humphries v. Carvalho*, 16 East. 45; *Cook v. Loxley*, 3 Book, T.R., vol. 5, p. 4; *Burton v. G. N. Railway Co.*, 9 Ex. 507; *Gt. Nor. Railway Co. v. Witham*, L. R. 9 C. P. 16; *Smith v. Weaver*, 90 Ill. 392; *Campbell v. Lambert*, 36 La. Ann. 35; *Houston v. Mitchell*, 36 Tex. 85; 1 *Pars. on Contracts*, p. 448.

There is no question, as already stated, that if the coke company had ever, at any time before the withdrawal of the furnace company, said to or agreed with the latter that it would perform the contract, that it would exercise its option which the contract, in express terms, gave it, then a binding contract would have been effected; but that in this case, it never did, and, therefore, the element of mutuality under this contract was not thereby supplied. If the coke company had done any act in recognition of the fact that the promise to

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pay by the furnace company was a consideration to it for the relinquishment of its right of election or option to furnish all or any of the coke to be furnished *in futuro* the same result would have followed as in the case of *Evans v. C. S. & M. Railway Co.*, 78 Ala. 345; but that would necessarily be, either in express terms or by implication, a surrender of the option by an agreement to perform the thing to which the option relates. An option accepted, expressly or impliedly, is no longer an option, but is an agreement. But so long as the option continues, is open, the party in whose favor it is reserved can not be deprived of it, and while it remains, no right of action is given against him respecting its subject matter. Hence, where there is an express option to do or not do a particular thing, the element of mutuality is not supplied, and can not be, so long as the option continues.—*Cook v. Loxley*, 3 T. R. 653; *Dickinson v. Dodds*, 2 Ch. Div. 463; *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Stevenson v. McLean*, 5 Q. B. D. 346; *Burton v. Gr. Nor. Railway Co.*, 9 Ex. 507; *Borst v. Simpson*, 90 Ala. 373, 7 So. Rep. 814; *East Line &c. R. R. Co. v. Scott*, 72 Tex. 70; *Chicago & Great Eastern Railway Co. v. Dane*, 43 N. Y. 242; *Evans v. C. S. & M. Railway Co.*, 78 Ala. 345; *Wilks v. Ga. Pac. R. R. Co.*, 78 Ala. 185; *Tiedeman on Sales*, § 41; *Bishop on Contract* (En. Ed.), § 78; *Davis v. Robert*, 89 Ala. 405, 8 So. Rep. 114; *Iron Age Pub. Co. v. W. U. Tel. Co.*, 83 Ala. 509, 3 So. Rep. 449; *Oliver v. Ala. Gold Life Ins. Co.*, 82 Ala. 425, 2 So. Rep. 445.

A promise is a good consideration for a promise; but a promise is not a good consideration for a promise unless there is an absolute mutuality of engagement so that each party has the right at once to hold the other to a positive agreement. This rule is not controverted in this case; but in all cases where the promise is relied on as a consideration, that promise must be concurrent or obligatory, or it is without mutuality. A promise must be absolute in the sense that it is obligatory on the party to be affected by it.—*Storm v. United States*, 4 Otto 76; *Emerson v. Slater*, 22 How. 35; *Evans v. C.S. & M. Railway Co.*, *supra*; *Ewing v. Gordon*, 49 N. H. 444; *Keep v. Goodrich*, 12 John. 397; *L'Amoureux v. Gould*, 3 Seld. 349; *Dresel v. Jordan*, 104 Mass. 412; *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20, 23; 1 Chitty on Contract, 297; 1 Chitty on Pl., 325; 1 Pars. on Contr., 450–452; *Tucker v.*

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Woods, 12 Johns. 190; *Eskridge v. Glover*, 5 Stew. & Por. 274; *Dorsey v. Packwood*, 12 How. 137; *Woods v. Edwards*, 19 Johns. 205; *Bradley v. Denton*, 3 Wis. 493; *Willets v. Sun. Mut. Ins. Co.*, 45 N. Y. 45; *Hill v. Roderick*, 4 Watts. & S. 221; *Hickman v. Glazebrook*, 18 Ind. 210; *Railroad Co. v. Dane*, 43 N. Y. 240; *Sykes v. Dixon*, 9 A. & E. 693; *Bailey v. Austrian*, 19 Minn. 535; *Mathews' Admr. v. Meek*, 23 Ohio St. 272; 292; *Philpot v. Gruinger*, 14 Wall. 570; *Comer v. Bankhead*, 70 Ala. 144; *Union Ref. Co. v. Barton*, 77 Ala. 157; *Bank v. Steele*, 10 Ala. 926; *James v. Stiggins*, 13 Ala. 825; *Erwin & Williams v. Erwin*, 25 Ala. 236; *Chambliss v. Smith*, 30 Ala. 370; 5 *Lawson's Rights*, Rem. & Prac., § 2243 and note; 3 *Amer. & Eng. Encyc. of Law*, p. 831, note 2.

A proposal to be made binding must be intended to affect legal relations. It must be an offer of a contract. Its terms must be sufficiently certain to enable the court to say what the agreement is.—*Recknagle v. Schmalz*, 33 N. W. Rep. (Iowa) 365; *Adams v. Adams*, 26 Ala. 272; *Whelan v. Sullivan*, 102 Mass. 204; *Barter v. Bishop*, 65 Iowa 582; *Pearce v. Watts*, 20 N. J. Eq. 472; *Taylor v. Portington*, 7 DeGex, M. & G. 328; *Roberts v. Smith*, 4 H. & N. 315; *Nelson v. Van Bonnhorst*, 29 Pa. St. 352; *Moorhouse v. Colvin*, 15 Beav. 341, 350; *Graham v. Graham*, 34 Pa. St. 475; *Thompson v. Stevens*, 71 Pa. St. 161.

The contract sued on was an executory one. The coke company has an option to deliver this coke in separate instalments. Before any instalment was delivered unquestionably it had the right not to deliver any portion of it or of any instalment. The delivery of any instalment, or the advice from it that it would deliver any quarterly instalment, was an exercise of its option to deliver for and as to that instalment; and that much of the contract became bilateral, by the advice or acceptance of the option, and executed by the delivery of any instalment. But as to any unexecuted part, so far as its agreement remains executory, it still had the same option, and was not bound under such option to make delivery of any further instalment. That much of it then remained unilateral, and all the authorities concur, that so long as it remained unilateral as to one party, the other could rescind it.—*Gt. Nor. Railway Co. v. Witham*, L. R. 9 C. P. 5; *Burtley v. Gt. Nor. Railway Co.* 9 Ex. 507; *C. & G. E. Railway Co. v. Dane*, 43 N. Y. 240; *Sey-*

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mour v. Davis, 2 Sandf. 239; *Thayer v. Burchard*, 99 Mass. 508; *Keller v. Ybarru*, 3 Cal. 147; *Railroad Co. v. Mitchell*, 38 Tex. 86; *Campbell v. Lambert*, 56 La. Ann. 35; *Bailey v. Austrian*, 19 Minn. 535; 3 Amer. & Eng. Encyc. of Law, p. 844 n.; 1 Benj. on Sales, §§ 66, 67, pp. 87, 88; 2 Suth. on Dam. 357-9.

The coke company was made by the contract the agent of the furnace company. The coke company undertook, if it undertook anything, to obtain coke for the furnace company from other persons. It was to induce manufacturers of coke to provide ovens for the purpose of filling this contract. In the literal signification of the language used the manufacturers were to fill the contract; but it is wholly immaterial, so far as the relation of the coke company to the furnace company was concerned, whether or not the manufacturers of the coke were to fill it. It clearly undertook to procure the coke. It refused to bind itself to deliver it, and when it did deliver it, although it may then have occupied the position of a vendor, it can not discard the relation of agent, at the same time resting upon it, and voluntarily assumed by it in a more explicit manner than any other obligation assumed throughout the whole transaction; nor can it repudiate the duties, obligations and liabilities growing out of that relation.—*Mechem on Agency*, §§ 214, 295, 687, 689, 932; *Un. Refining Co. v. Barton*, 77 Ala. 148; 1 Amer. & Eng. Encyc. of Law, 347, n. 2; *Braun v. Chicago*, 110 Ill. 186; *Sibbald v. Iron Co.*, 83 N. Y. 378; *Wylie v. Marine Nat. Bank*, 61 N. Y. 415; *Ireland v. Livingston*, 5 Eng. & Irish App. L. R. 395; L. R. 5 H. L. 395; *Farmers' Bank v. Logan*, 74 N. Y. 577, 578; *Moors v. Kidder*, 106 N. Y. 32; *Newhall v. Vargas*, 13 Me. 93; *Armstrong v. Elliott*, 29 Mich. 485; *Kimber v. Barber*, 9 L. R. C. H. 56; *Gt. Lurembourg Railway Co. v. Sir William Magnay*, 25 Beav. 586.

The coke company, being the agent for the furnace company in the purchase of coke, could not buy its own property for the furnace company.—1 Story's Eq. Jur., §§ 315, 316; *Conkey v. Bond*, 36 N. Y. 427; *Taussig v. Hart*, 58 N. Y. 425; Story on Agency, § 9; *Mechem on Agency*, § 68; 1 Amer. & Eng. Encyc. of Law, 375; *Pegram v. Railroad Co.*, 84 N. C. 696. And likewise was it a breach of the fiduciary relation for the coke company to act as agent for the furnace company and also as

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agent for the manufacturers in making the sale.—*Adams v. Sayre*, 70 Ala. 326; *Anson on Contracts*, 341; *Porter v. Woodruff*, 86 N. J. Eq. 179-181; *Murray v. Beard*, 102 N. Y. 508; *Mechem on Agency*, §§ 462, 952; *Anson on Contracts*, 335-6, 343; *Robinson v. Mollett*, L. R. 7 H. L. 802; 1 *Benj. on Sales*, 257; *Taussig v. Hart*, *supra*; *Murray v. Beard*, *supra*; *Dutton v. Willner*, 52 N. Y. 312.

In the contract sued on in this case, the furnace company was entitled to any benefits resulting from the reduction in the rate of freight. It is plain that \$5.10 was not the fixed price mentioned as such in the contract, because the coke company was to deliver the coke f. o. b. cars at Sheffield, which necessarily includes the freight and all other charges prior to an absolute delivery. If the freight advances the \$5.10 price is either to go up, or all sales or deliveries are at an end. If \$5.10 were the agreed price, this could not be so. Hence, it is considered that at the initial point and throughout the agreement the coke company had severed the items, separated the component parts of the consideration, which the furnace company was to furnish for the coke when delivered; one item being the value of the coke at the ovens, and the other, the freight which would have to be paid at Sheffield from the ovens to that point, which could not be fixed or agreed upon, but might be different, more or less, at different times. This is strictly conformable to the language used by the party by whom the coke was to be furnished, and which seems to have been inserted to strengthen and emphasize this feature of the arrangement. And the further declaration is made in the contract: "It is understood that the Hull Coal & Coke Company have freight rate to Sheffield, Alabama, on which the above price is based." It will not do to say, that the coke company simply considered this in making up its aggregate of \$5.10 for an agreed price; because prior to that basis being employed, it had provided for a fixed price, and the only fixed price mentioned throughout the instrument was at the ovens, which could not include freight to some other point. That this provision for the "fixed price" mentioned had reference to that at the ovens and to the manufacturers, is unmistakable; and, according to the coke company's contention, that this was a sale by it, can not be disputed; because, if the agreed price, in its entirety, the \$5.10 as a unit of value,

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was to be paid to the operators, to whom it was to be promised as an inducement for manufacturing the coke. then there was in the contract no other function for the coke company to perform under the contract, than and except as purchasing agent for the furnace company. This denotes a purpose, if it was a sale, as now insisted for the coke company, to have the price for the coke at the ovens, and makes this price a separate factor of the consideration. Following this the coke company represents that it had a freight rate to Sheffield, and it then makes that rate a basis of the price. This is the special act in the contract of the coke company. It had the freight rate and using this as a basis, that rate was made by both an integer, a distinct entity, of the price. Unless one or the other of these items is excluded from consideration, it must follow that it was the intention of the parties that the \$5.10 should represent the sum of these two distinct and separate items; and not that the \$5.10 should by itself be a single term, and agreed price, without respect to either a fixed price to the operators or a certain sum as freight to the carrier. And thus severed by the act of the parties, as this contract makes the consideration, into two items or integers, we have presented the common case of a dual consideration, or one composed of two or more distinct items. Contracts of this nature have been frequently recognized and construed by the courts.—*Montgomery Gas Co. v. City Council*, 87 Ala. 251, 6 So. Rep. 113; *Evans v. C. S. & M. Railway Co.*, 7 Ala. 346; *Norris v. Harris*, 15 Cal. 226, 256; 1 Benj. on Sales, § 77, p. 95; *Hooper v. S. M. & M. R. R. Co.*, 69 Ala. 534; *Bank v. Recknagle*, 109 N. Y. 482. If this be correct, then the act of the party in basing the price upon the freight rate would go directly to the consideration and in the event of a reduction of the freight rate, there would be a failure *pro tanto* of the consideration, a partial removal of the base on which the contract rests, on which the one whose promise was based thereon could avail itself. There can, therefore, be no question as to the right of the furnace company to claim the benefit of the reduction in the freight rate.

Under the contract in this case the furnace company was not required to pay the freight on the coke at the time of delivery. "f. o. b. cars, Sheffield, Alabama" meant that the coke was to be delivered to the furnace

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company at Sheffield, Alabama, free of all charges. The contract contained the further stipulation, "buyer to remit on or before the 10th of each month for all shipments made during the preceding month." This gave to the buyer a credit on coke for each month's shipment, until the 10th of the succeeding month, and if the furnace company was required to pay the freight at the time of delivery, there would not be a credit for the whole amount to be paid for the coke received in one month until the 10th of the succeeding month. The credit feature of the sale on credit is certainly an essential element of it.—2 Addison on Contracts, § 584; 2 Benj. on Sales, § 1016; *Dutton v. Solomonson*, 3 Bos. & P. 582; *Brooke v. White*, 1 Bos. & P. 330; 5 Wait's Ac. & Def., p. 583; Story on Sales, § 240; Newmark on Sales, § 6, n. 19; *Anstedt v. Sutter*, 30 Ill. 164, 166. The court below sought to avoid the effect of this, by admitting testimony that the usage of the coke trade was that f. o. b. cars at the point of delivery meant that the buyer was always to pay the freight, and be credited with it, when he came to pay the seller the agreed price. This might be true, though it is not conceded under this contract, if the payment of the agreed price was to be made when the goods were delivered; but it can not be so, where there is no separation of payments made in the contracts, and when the price was to be paid at a future day. What is the rule of law on this subject? If the terms of the contract itself supply the proper construction, no extraneous evidence can be introduced to contradict it. If the usage set up is inconsistent with the terms of the contract it is not incorporated in the contract, and such usage can not prevail against the contract.—*Moran v. Prather*, 23 Wall. 492; *Thompson v. Riggs*, 5 Wall. 663; *U. S. v. Buchanan*, 8 How. 83; *Hopper v. Sage*, 112 N. Y. 330; *Barnard v. Kellog*, 77 U. S. (10 Wall.) 383; *F. & M. Nat. Bank v. Logan*, 74 N. Y. 586; 2 Pars. on Contracts, 546, n.; *Smith v. Clews*, 114 N. Y. 190 and note thereto in 11 Amer. St. Rep. 632; 23 How. 49. Evidence of custom and usage may be admissible to explain what is doubtful in a written contract, but never to contradict what is plain.—*Scott v. Hartley*, 25 N. E. Rep. 826; *Cox v. Peterson*, 30 Ala. 608; *M. & E. R. R. Co. v. Kolb*, 78 Ala. 396; *Wilkinson v. Williamson*, 76 Ala. 163; *E. T., Va. & Ga. R. R. Co. v. Johnston*, 75 Ala. 596; *Robinson v. Mollett*, L. R. 7 H. L. 802; Anson on Contr., 343.

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Did the party who was entitled to treat the contract as broken, so treat it, or did he continue to treat it as operative, and insist upon its further performance? If he acted upon the breach, if there was one, then his only duty would be to show the breach, and his right to damages would be the legal consequence. But, on the other hand, if he still insisted upon the performance of the contract by the party alleged to have broken it, he waived the breach, and can not found a right of recovery thereon. If a promisee does not accept the renunciation, and continues to insist on the performance of the promise, the contract remains in existence for the benefit and at the risk of both parties, and if anything occurs to discharge it from the other causes, the promisor may take advantage of such discharge.—*Avery v. Bowden*, 5 E. & B. 714; *Lynch v. Paris, L. & G. E. Co.*, 1 S. W. Rep. 208; *Bishop on Contr.*, § 829; *Gould v. Bank*, 8 Wend. 562; *Friess v. Rider*, 24 N. Y. 367; *Borst v. Simpson*, 90 Ala. 375, 7 So. Rep. 814; 2 Benj. on Sales, § 860.

R. C. BRICKELL, J. B. MOORE and LAWRENCE COOPER *contra*.—No matter what view may be entertained of the first contract considered alone, there can be no doubt about the meaning of the second. The stipulations therein are absolute as to each party. The first contract is interpreted by the second, and turned into an engagement by one to deliver and by the other to receive, and then goes on to specify precisely how the delivery is to be made, "until the whole quantity shall have been delivered." This second contract, if it had not been interpreted by the parties to it in their subsequent dealings, would plainly indicate an absolute promise by the one to deliver, and by the other to receive the coke contracted for, and to that extent to have modified the first. The parties, however, who entered into this second contract put their own interpretation on this feature of it, and by their conduct and dealings for more than five months, show unmistakably, that they mutually understood and acted on the engagement as being absolute as to each. If there had thus been any doubt about the meaning, the conduct of the parties resolved it, as a reciprocal and absolute contract to receive and to deliver.—*Wharton on Contracts*, § 653; *Chicago v. Sheldon*,

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ll. 50; *Louber v. Bangs*, 2 Wall. 728; *Railroad Co. v. Ambler*, 10 Wall. 367; *Steinbach v. Stewart*, 11 Wall. 566; *Amer v. Bankhead*, 70 Ala. 141.

If it were conceded that, the first contract, was in its option optional with the plaintiff, or wanting in mutuality, when the plaintiff accepted or exercised whatever of option was conferred, or performed that part of the contract in consideration of which the promise was made, the contract ceased to be optional, or wanting in mutuality.—*Atlee v. Bartholomew*, 5 Amer. 113, note; *Cherry v. Smith*, 39 Amer. Dec. 150 and note; *L'Amoureux v. Gould*, 3 Seld. 349; *White v. Baxter*, N. Y. 254; *Willets v. Sun Mutual Ins. Co.*, 45 N. Y. 45. The evidence shows that immediately upon entering into the first contract, the plaintiff arranged for the production of the full supply of coke necessary to fill the engagement with the defendant. And after this, the second contract was made. The plaintiff having no other use for any option, therefore, made the absolute engagement shown in the second contract. Standing in the light of the circumstances of the parties at the date of the second contract, after the plaintiff had the ovens erected and had contracted for a full supply of coke to fill the contract, we see that there can be no doubt about the stipulations in that contract.—1 Indexed g. U. S., S. C. Rep. 430, § 177.

Here, then, plaintiff first promised, in consideration of defendant's promise, to endeavor to have the ovens provided for filling the contract, and, second, that being accomplished, to deliver the coke in quantity and at the time specified—the defendant promising to take the coke as stipulated. It is plain, then, that on the plaintiff's performing the first promise, and making the provision for the manufacture of the coke, there is no longer any right in the defendant to say, there is a want of consideration to it for its promise to receive the coke.—*Bishop v. Contracts*, §§ 85, 87; *Storm v. U. S.*, 94 U. S. 83; 1 Marton on Contr., § 524; *L'Amoureux v. Gould*, 3 Seld. 349; *Atlee v. Bartholomew*, 5 Amer. St. Rep. 103 and note.

The second contention of counsel for appellant is based on the assumption of their first being correct, and that the contract being executory as to the delivery, the plaintiff had an option only and was under no obli-

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gation to deliver, and that the defendant had the right to rescind the contract as to all undelivered instalments. The fallacy of this position is in its base. The contract we have seen was mutual and binding. The defendant, by the terms of its contract, gave its orders for the delivery of the whole amount of coke contracted for, in instalments at the rate of about ten cars per day until the whole quantity was delivered, and the plaintiff accepted the order and agreed to make the delivery. There was a promise for a promise, each of which was absolute. Addison on Contracts, § 18; *Storm v. U. S.*, 94 U. S. 83; Pollock's Principles of Cont., (Wald's Ed.) 160.

We do not dispute the proposition that custom or usage can not be introduced to change the plain terms of a contract. But if there is anything doubtful or ambiguous, or if the custom can have force as a term of the contract, without displacing the plain meaning of the express terms, it is permissible to interpret the contract in the light of such custom.—*Haas & Bro. v. Hudmon Bros. & Co.*, 83 Ala. 174, 3 So. Rep. 302; *Robinson v. U. S.*, 13 Wall. 363; *Smith v. Aikin*, 75 Ala. 209. We submit that the evidence falls directly within the rules under which usage may be proved. The contract is clearly ambiguous. And the usage does not necessarily conflict with the meaning of the other terms of the contract—that is the terms of the contract do not expressly or by necessary implication exclude the usage—they do not show “that the parties did not mean to be governed by it.”—Clarke's Brown on Usages and Customs, §§ 41 and 46; *Collender v. Dinsmore*, 55 N. Y. 200; *Walls v. Bailey*, 49 N. Y. 464; 1 Smith's Lead. Cases, (8 Ed.), 934 *et seq.*; *Smith v. Clews*, 11 Amer. St. Rep. 627, and n.; *Haas & Bro. v. Hudmon Bros. & Co.*, 83 Ala. 174, 3 So. Rep. 302; *Smith v. Aiken*, 75 Ala. 209; *E. T. V. & G. R. R. Co. v. Johnston*, 75 Ala. 604; 2 Wharton on Law of Evidence, §§ 966-7-8-9, 971-2; Lawson on Usages and Customs, 435.

It is undoubtedly true, as stated by counsel, that if the party will not accept the renunciation, and continues to insist on the performance of the promise, the contract remains for the benefit and at the risk of both parties, and if anything occurs to discharge it from other causes, the promisor may take advantage of such discharge. But, in the first place, no point was raised in the lower

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urt, or appears by assignment of error in this court, the effect of waivers of renunciations of contracts by subsequent negotiations or otherwise. And, in the next place, we submit, that, if the party renouncing will not, and does not, accept the offer of the other party to waive the renunciation, and refuses all such offers and negotiations, the party renouncing can not complain that the other party does finally accept and act upon the original renunciation. And in such case the original renunciation would be the basis of an action, since, unless waived by the party making it, it is continuous and may be accepted at any time before it is retracted.—3 Amer. & Eng. Encyc. of Law, 904-5-6; *Howard v. Daly*, 61 N. Y. 5; *Frost v. Knight*, L. R. 7 Ex. Cases, 111; *Nilson v. Morse*, 52 Wis. 240; *Zuck v. McClure*, 98 Pa. St. 541; Benj. on Sales, § 860 and notes.

MCCLELLAN, J.—On August 30, 1887, the Hull Coal & Coke Company and the Sheffield Furnace Company executed the following writing: "Hull Coal & Coke Company sell to Sheffield Furnace Company, and Sheffield Furnace Company buy from Hull Coal & Coke Company 3,900 cars Flat Top Coke at \$5.10 per net ton (2,000 lbs.) f. o. b. cars Sheffield, Ala., provided Hull Coal & Coke Co. are able to induce the operators to build ovens, and make coke for 3,700 cars of the above amount. Sellers agree to furnish 200 cars of the above amount between September 20th and November 1st, 1887. On October 1st sellers are to advise buyers how much of the 350 cars they can furnish during the month of November, 1887. On November 1st sellers are to advise buyers how much of the 350 cars they can furnish during the month of December, 1887. December 1st 1887 sellers are to advise buyers how much they can furnish of the 750 cars during the first three months of 1888. February 1st sellers are to advise buyers how much they can furnish of the 750 cars the second three months of 1888. May 1st sellers are to advise buyers how much they can furnish of the 750 cars during the third three months of 1888. August 1st sellers are to advise buyers how much they can furnish of the 750 cars for the last three months of 1888. Deliveries to be made as near as possible proportionately during each period.

"These conditions of sale, binding the buyers to take

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the coke as specified above from September 20th, 1887, to December 31st, 1888, giving sellers option of furnishing for said time, are entered into for the purpose of enabling sellers to induce the operators to put up more ovens by promising them a certain sale of the product of these ovens at a fixed price.

"The sellers undertake in good faith to use their best endeavors in inducing manufacturers of coke to provide ovens for the purpose of filling this contract. Norfolk & Western Railroad weights at usual point of weighing for these mines to govern. Buyers to remit on or before the 10th day of each month for all shipments made during the preceding month. In case of strikes, accidents, deficient transportation, or other cause unavoidably causing stoppage or partial stoppage of the works of the manufacturer of this coke or of its shipment, or in case of strikes, accidents, or other cause unavoidably causing stoppage or partial stoppage of the works of the buyer, deliveries herein contracted for may be suspended, or partially suspended, as the case may be, or at the option of the party not in default may be immediately cancelled during the continuance of such interruption by immediate notice to that effect given to the other party. Such interruption or cancellation, however, shall not invalidate the remainder of this contract, but on removal of the cause of interruption deliveries shall be continued at the specified rate, and if the delayed deliveries shall not have been cancelled they shall be made thereafter at the regular rate commencing when the contract would otherwise have ended. It is understood that Hull Coal & Coke Company have freight rates to Sheffield, Ala., on which the above price is based, but if during the time this contract is in force this rate should be advanced then buyers have the option of taking any undelivered portion due on this contract, at the advance, or of cancelling it, provided sellers do not elect to stand said advance."

A few days after this instrument was executed, Hull Coal & Coke Company used its "best endeavors in inducing manufacturers of coke to provide ovens for the purpose of filling this contract;" and succeeded. Said company was "able to induce" and did in fact induce operators—manufacturers of coke—to build ovens for the manufacture of 3,700 cars of coke of the kind specified

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the writing, and this coke was to be manufactured for the company at a price agreed on between it and the producers for the purpose on its part of filling its contract with the defendant corporation. All this was accomplished, the operators induced to build ovens, the ovens built in sufficient numbers and with adequate capacity and sufficient coke actually produced to comply with the terms of the contract in respect of the initial deliveries, before the time at which deliveries were to commence had arrived. Not only so, but Hull Coal & Coke Company, prior to said time, with a view to this contract had engaged and bound itself to take from the said operators, at a price agreed upon, the gross quantity of coke necessary to fill its contract with the Sheffield Furnace Company, and duly notified the latter company of the success of its efforts to induce operators to build sufficient additional ovens to produce the requisite quantity of coke. And on September 30th, 1887, the Hull Coal & Coke Company advised the furnace company in respect of the number of cars of coke it could furnish during the month of November following, to the effect that owing to temporary scarcity of water in the coke fields it would probably be impracticable to deliver 350 cars during November, but this deficiency the coke company proposed to, or suggested it would, anticipate and discount by delivering more than the 200 cars required by the contract in October, asserting its belief that in this way 550 cars—the gross number stipulated for during the period—could be in any event delivered between October 1st and December 1st. At the instance of the furnace company, deliveries were partially suspended after about October 8th and throughout the months of November, December and January, so that up to January 30th, 1888, only sixty-six cars had been delivered. On that day, the following instrument was executed by Hull Coal & Coke Co. and the Sheffield Furnace Company: "This memorandum of an agreement made this 30th of January in the year 1888 by and between the Hull Coal & Coke Company of the first part, and the Sheffield Furnace Company, of the second part, witnesseth: That, whereas, there is a contract now in existence between the parties hereto of date August 1st, 1887, whereby the party of the first part is to deliver to the party of the second part, and the party of

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the second part is to take from the party of the first part 3,834 cars of Flat Top Coke (66 cars having already been delivered out of the 3,900 cars secured to the party of the second part under said contract), which contract is hereby referred to as a part hereof. And whereas the parties hereto have mutually agreed to postpone the delivery of the said remaining 3,834 cars in such manner that said delivery shall begin about the first day of May, 1888, and shall thence continue at the rate of about 100 cars *per* day until the whole quantity shall have been delivered. Now in consideration of such agreement and of the sum of one dollar cash in hand paid by the party of the first part to the party of the second part, the receipt whereof is hereby acknowledged, the said delivery is postponed accordingly."

After this writing was executed there were some further deliveries of coke, beginning about May 1st and continuing for something over two months, and under five hundred and sixteen cars (including the sixty-six cars delivered prior to the writing of January 30th, 1888, and mentioned therein) of the 3,900 cars had been delivered; but the deliveries after this second agreement were not of the full quantity originally contemplated by the parties and this deviation from the terms of the writings was had at defendant's instance, who from time to time requested the partial or total suspension of shipments, being unprepared to use or store the full quantity of coke as called for by the writings. Upon these suspensions it became necessary for the plaintiff to make other dispositions of the coke it had contracted to take from the producers for the purpose of filling the contracts with the defendant, or to induce the manufacturers to lessen their out-put for the time of such suspension. During the first part of the month of July, 1888, the plaintiff had suspended shipments at defendant's request and had induced the producers to reduce their out-put so that the quantity manufactured was not more than the plaintiff could dispose of to third persons. To do this the ovens of the manufacturers had to be banked—the fire being put out—and it required several days to re-heat them sufficiently to make a good quality of coke. As to so much of the out-put intended for this contract as the plaintiff had diverted to third persons upon the suspension requested by defendant, it required some

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little time to arrange with such persons for a cessation of shipments to them in order that deliveries might be resumed to the defendant. Pending this suspension in July, the plaintiff had made temporary arrangements with other parties to take a part of the coke intended for the defendant, and as to the residue so intended the production was temporarily stopped, the fires in the ovens being banked or extinguished. The defendant was fully cognizant of all these conditions, and of the arrangements plaintiff had made with third persons and with the manufacturers for the purpose of enabling to comply with defendant's request for the suspension of deliveries then pending. This was the state of affairs when, beginning on July 19, 1888, the following correspondence was had between the parties:

"MONTGOMERY, ALA., July 19, 1888.

Hull Coal & Coke Co., Louisville, Ky.

Resume shipments of coke immediately. We make no payment until the 10th of the succeeding month either for freight or coke. Our secretary telegraphs immediate resumption of coke shipments necessary to keep in blast. Answer quick Montgomery and Sheffield when shipments will be resumed.

SHEFFIELD FURNACE CO.,
By Alfred H. Moses, Pres."

"July 19, 1888.

A. H. Moses, Montgomery, Ala. Dispatch received. Hull and Lafferty both away. Hull is in New York. Matter will be referred to Lafferty to-morrow.

[Signed] HULL COAL & COKE CO."

"July 20th, 1888.

Impossible to resume shipments immediately. It will take from one to two weeks to heat ovens sufficiently to draw good coke. If shipments can be stopped elsewhere that coke might be turned over to you. Will do best I can.

HULL COAL & COKE CO."

"SHEFFIELD, ALA. July 21st, 1888.

Hull Coal & Coke Co., Louisville, Ky.

Have shipments of coke been resumed?

[Signed] SHEFFIELD FURNACE CO."

"LOUISVILLE, KY., July 21st, 1888.

Sheffield Furnace Co., Sheffield, Ala.

Shipments not resumed yet. We wired you, would

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take sometime to heat up ovens which were put out when you ordered shipments discontinued.

[Signed] HULL COAL & COKE CO."

"SHEFFIELD, ALA., July 23d, 1888.

Hull Coal & Coke Co.:

Have ovens been fired? When? What steps taken to expedite resumption shipments? When will you assure resumption? Coke supply nearly exhausted. Unless assurance speedy resumption will be forced to bank or blow out. Answer.

[Signed] SHEFFIELD FURNACE CO."

"LOUISVILLE, KY., July 23, 1888.

Sheffield Furnace Co., Sheffield, Ala.

Hope to be able to resume shipments to-morrow or next day.

[Signed] HULL COAL & COKE CO."

"LOUISVILLE, KY., July 23d, 1888.

Sheffield Furnace Co., Sheffield, Ala.

Will suspend shipments to others and instruct shipments resumed at once provided you pay freight as heretofore. Answer.

[Signed] HULL COAL & COKE CO."

"LOUISVILLE, KY., July 23d, 1888.

Sheffield Furnace Co., Sheffield, Ala.,

Gentlemen: We wired you per the enclosed advising that we hope to be able to resume shipments tomorrow or next day. Since then have sent another dispatch per the enclosed letter, you, we would suspend shipments to others and instruct shipments resumed to you at once provided you pay freight as heretofore, asking you to wire answer in reply to this. We shall await your reply, and if favorable will instruct shipments resume immediately. Will arrange with others to wait for the coke until we can get new ovens heated up. You must recognize that it is impossible to hold ten cars of coke per day subject to orders of any one so we can begin shipments of this amount immediately. When customers order shipments stopped we must either place coke elsewhere or put ovens out, and it often takes a week or ten days to get ovens hot enough to make first class coke after it has once been banked. We shall expect to r

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ive dispatch from you tomorrow advising that you pay
eight on coke as usual.

[Signed] Yours truly, HULL COAL & COKE CO.
Per H. D. Lafferty G. M."

"SHEFFIELD ALA., July 23d, 1888.

Hull Coal & Coke, Co., Louisville, Ky.

As you admit ability to ship coke immediately, but
refuse unless we pay freight otherwise than is stipulated
in the so called contract, you have violated the same
and we are released therefrom, and will no longer be
bound thereby.

[Signed] SHEFFIELD, FURNACE Co."

"SHEFFIELD, ALA., July 24, 1888.

Hull Coal & Coke Co., Louisville, Ky.

If we withdraw claim of violation by you, will you re-
sume shipments coke immediately, and concede our
right of freight reduction? Answer quick as supply
near exhausted, and we must blow out or bank this even-
g.

[Signed] SHEFFIELD FURNACE Co."

"LOUISVILLE, KY., July 24th, 1888.

Sheffield Furnace Co., Sheffield, Ala.

Repeated your dispatch to Mr. Hull at U. S. National
Bank, New York, asking him to wire direct.

[Signed] HULL COAL & COKE Co."

"SHEFFIELD, ALA., July 24th, 1888.

Hull Coal & Coke Co., Louisville, Ky.

Answer our morning telegram. Highly important as
we must notify labor on next turn. Have not heard
from Mr. Hull, six fifty-five o'clock.

[Signed] SHEFFIELD FURNACE Co."

"NEW YORK, July 25th, 1888.

SHEFFIELD FURNACE Co., Sheffield, Ala.:

We have made no failure and violated no contract, but
we have been ready to comply with all its terms.
The claim you have refused to carry out terms of contract
by stopping shipments of coke, and by refusing to con-
tinue payment of freight as heretofore, but to save you
from going out of blast or from annoyances, we will con-
sent to pay freight ourselves and continue to deliver the
coke, you paying for it five dollars and ten cents per
ton, the price stated in the contract, or we will consent

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to modify contract and give you benefit of all the reduction we have talked of, amounting now to eighty-five cents per ton, in consideration and with the understanding that you are to make us daily shipments of iron on sales or for storage of sufficient value to cover our daily shipments of coke and freight. Answer care United States National Bank, New York.

[Signed] HULL COAL & COKE Co.,
By Geo. H. Hull, Pres't."

"SHEFFIELD, ALA., July 25th, 1888.

HULL COAL & COKE Co., Geo. H. Hull, Pres't, Care U. S. National Bank, New York :

Telegram received too late to avoid banking furnace. We deny violation, and insist you violated so-called contract. If we ratify and reinstate it, will you resume shipments immediately prepaying freight and we paying on 10th of succeeding month whatever the instrument may require under its proper construction. Answer quick, as we must consult absent parties before ratifying or reinstating, and must instruct ore shippers. If reinstated we must stand consequences if courts decide we are not entitled to freight reductions, now ninety cents.

[Signed] SHEFFIELD FURNACE Co."

"NEW YORK, July 26th, 1888.

SHEFFIELD FURNACE Co., Sheffield, Ala.

Replying to your telegram of yesterday: We stand on our offers of yesterday. Answer whether you accept either of them. [Signed] HULL COAL & COKE Co.,
By Geo. H. Hull, Pres't."

"SHEFFIELD, ALA., July 26th, 1888.

GEO. H. HULL, P't. Hull Coal & Coke Co., New York.

Answer yesterday's telegram, ore shippers demand instructions from us. We must instruct, or they will sell to others, in which event we can not get ore to go into blast before Jan'y. [Signed] SHEFFIELD FURNACE Co."

"SHEFFIELD, ALA., July 26th, 1888.

DEAR SIR:—Not hearing from you in reply to our telegram of yesterday, we have just answered you 'Answer yesterday's telegram, ore shippers demand instructions from us. We must instruct, or they will sell to others,

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which event we can not get ore to go into blast before January'. Which we now confirm.

Very truly yours,

[Signed] ALFRED H. MOSES, Pres't,
For Sheffield Furnace Co.

Geo. H. Hull, Esq., Pres't Hull Coal & Coke Co., care
of U. S. Nat'l Bank, New York."

In the foregoing correspondence are mentioned the two points of difference and contention between the parties, which had arisen between them up to the time at which, it is claimed by each, the other put an end to the contract by violating its terms, or refusing to carry it out according to its tenor and effect. As appears from this and other parts of the voluminous correspondence that passed between the furnace company and the coke company, it was, in the first place, and this as early as the fall of 1887, soon after the commencement of deliveries under the contract, insisted by the furnace company, that by the terms of the contract the coke company was to pay all freight charges on the coke as and when delivered, and such charges were to be refunded to it, as and constituting a part of the gross price per ton which the furnace company was to pay the coke company on the 10th day of the month succeeding that of the deliveries settled for. On the other hand, the coke company contended that the contract, as interpreted in the light of a general usage of the coke trade devolved upon the furnace company the duty of paying the freight charges to the carrier on receipt of the several shipments, and that the amounts so paid during a given month should go as credit on a settlement for the gross price of the coke made on the 10th of the succeeding month. Upon the furnace company's contention in this regard being first brought forward on October 12th, 1887, by its book-keeper, at the suggestion of one Chas. D. Woodson, who was a director of the company, and who, with the company's general manager, had constituted the committee on the part of that company to make this contract with the coke company, the latter replied that, under the terms of the writing, taken in connection with said custom, it was the duty of the furnace company to pay the freight charges and have the amount thereof credited to it on the succeeding monthly settlement; and to this Woodson responded for the company on October 22:

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"Can't you stop coke until further orders? We will pay freight." And after this the furnace company continued to pay such freight charges, without further objection, until June or July, 1888, and did indeed pay such charges on every car of coke it received from the plaintiff. The other matter of dispute indicated in the correspondence copied above, and to which reference is also made in other letters, telegrams and propositions that passed between the parties, grew out of a claim on the part of the furnace company, and its denial and repudiation on the part of the coke company, that by the terms of the contract the furnace company was entitled to the benefit of all reductions in freight on coke delivered at Sheffield occurring subsequent to the date of the contract. There were several reductions, aggregating eighty-five cents per ton, and the furnace company insisted that the price of \$5.10 per ton, originally agreed on, should be reduced, and was, by a just interpretation of the contract, reduced to \$4.25 per ton.

The present action by Hull Coal & Coke Company against the Sheffield Furnace Company proceeds on the theory that the writings set out above, taken in connection with the facts we have stated, constituted a binding contract of sale by the plaintiff to the defendant of 3,900 car loads of coke, that the defendant wrongfully refused to accept and receive the coke it had contracted to receive, and thus violated its contract, and that this breach damnified the plaintiff in the sum of \$100,000, which is the amount claimed in the complaint. There was verdict and judgment for plaintiff for \$35,000.

The main defenses relied on at the trial were three. First, it is insisted that the writings executed by the parties impose no contractual obligations upon the defendant because of a want of mutuality, there being, it is said, the assumption of no enforceable obligation on the part of Hull Coal & Coke Co., and hence, it is argued, the formal assumption of obligation on the part of the furnace company is formal only, and without efficacy. Again, it is contended that the duty to pay freight was upon the coke company, and that its failure and refusal so to do was a breach of its contract which authorized the furnace company to wholly repudiate it. And it is further insisted, that the contract secured to the defendant the benefit, in the way of credit on the agreed price

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per ton of the coke, of all reductions in freight rates for the carriage of the coke from the place of manufacture to Sheffield, that there were material reductions in these rates and that the coke company refused to allow the defendant the benefit thereof, thereby committing a breach of the contract, which released the defendant from all further obligation under it. These defenses will be considered in the order stated; and afterwards we will briefly advert to some minor points presented by the record.

Was the agreement evidenced by the writings unilateral, involving a mere option on the part of the coke company to deliver the specified quantity of coke to the furnace company, and for this reason, as is argued, not binding on either party? The contention that the agreement is of this class has for its basis certain provisions in the first four clauses of the writing executed August 30, 1887. Thus, in the first clause, the instrument evidences a sale by the coke company to the furnace company of 3,900 cars of coke provided the seller is able to induce operators to build ovens and make coke for 3,700 of said cars. Following this are stipulations which require the seller to advise the buyer at various dates mentioned how much coke can be supplied during certain subsequent periods, as, for instance, on "December 1st, 1887, the sellers are to advise buyers how much they can furnish of the 750 cars during the first three months of 1888." The third clause of the writing is as follows: "These conditions [those referred to above] of sale binding the buyers to take the coke as specified above from September 20th, 1887, to December 31st, 1888, [and?] giving sellers option of furnishing for said time, are entered into for the purpose of enabling the sellers to induce the operators to put up more ovens by promising them a certain sale of the product of these ovens at a fixed price." And it is further stipulated, that "the sellers undertake in good faith to use their best endeavors in inducing manufacturers of coke to provide ovens for the purpose of filling this contract."

Considering the agreement of August 30, 1887, apart from the writing of January 30, 1888, and taking hold of it immediately upon its execution, that is, before the coke company induced the erection of additional ovens sufficient in number to manufacture the requisite quantity of coke to fill the contract, it may be conceded that

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the instrument was unilateral, imported no enforceable obligation on the part of the coke company, and hence was not binding on the furnace company. But that, the original status of the parties was entirely changed by what they, and especially the coke company, did under and in performance of the agreement. We understand the writing itself to mean simply this, that upon the success of the coke company's promised endeavors to induce operators to build additional ovens, and make 3,700 cars of coke for said company during the time covered by the agreement, that company became absolutely bound to supply the furnace company 3,900 cars of coke between September 20, 1887, and December 31, 1888. There is no other condition to an absolute sale mentioned anywhere in the writing. This condition and no other is stipulated in its first clause, where the sale is made contingent alone on the coke company's ability to induce operators to make the necessary coke. The second clause, which requires the coke company to advise the furnace company from time to time specified how much coke could be supplied during specified subsequent periods, is, in our opinion, only a resultant of the uncertainty as to how much could be delivered at all, and this uncertainty was referable solely to the condition in the first clause, and was removed as soon as that condition was complied with. And the necessity for the condition, the purpose for which it was incorporated and its meaning and intent are clearly shown in the third clause. The necessity for it arose from the fact that the output of the stipulated brand of coke at the date of the agreement was not sufficient to fill its terms. The coke company did not know that the operators could be induced to sufficiently increase the out-put to enable it to supply 3,900 cars to the furnace company. It was unwilling to bind itself in that regard until it had satisfactory assurances in the building of additional ovens, and in the undertaking of the operators that the available supply would be adequate. On the other hand, the obligation of the furnace company to take this quantity of coke was naturally an important factor of the inducements held out to the operators. And hence, as appears from the third clause of this writing, the sole purpose of the option to the coke company was to enable it "to induce the opera-

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ors to put up more ovens by promising them a certain sale of the product of these ovens at a fixed price," and when this purpose was subserved the option ceased, and the agreement of the coke company was converted from a conditional and optional one, to supply the coke if the building of sufficient ovens could be induced, into an unconditional and absolute contract to supply the coke, the building of sufficient ovens, which was the only contingent element in the agreement, having been induced. The evidence is clear and free from conflict to the proof of the efforts of the coke company to induce the building of the additional ovens and the manufacture of the requisite coke by the operators, as was contemplated in the agreement, and of the entire success of these efforts. Thereby the condition to plaintiff's absolute obligation to sell and deliver the coke was met and removed and the unilateral agreement, not binding on either party because in terms not binding on one, was converted into a mutually obligatory contract.—1 *Parsons on Contracts*, 477, *et seq.*, and notes; *Wilets et al. v. Sun Mutual Ins. Co.*, 45 N. Y. 45; *Atlee v. Bartholomew*, 5 Am. St. 103, n. 113; *Cherry v. Smith*, 39 Am. Dec. 150, n. 152; *White v. Baxter*, 71 N. Y. 254; *L'Amoureux v. Gould*, 7 N. Y. 349.

That the parties themselves understood and treated this agreement, after this condition had been met and filled, as a mutually binding contract is manifested by the supplementary agreement of January 30th, 1888, wherein it is recited and stated, "that there is now a contract in existence between the parties hereto, of date August 30th, 1887, whereby the party of the first part is to deliver to the party of the second part, and the party of the second part is to take of the party of the first part 3,834 cars of Flat Top Coke (66 cars having already been delivered out of the 3,900 cars secured to the party of the second part under said contract), and which contract is hereby referred to as a part hereof," &c. Here is an express and direct recognition and declaration by the parties of the absolute and unconditional character imparted to the agreement of August 30, 1887, by the performance by the plaintiff of the condition therein stipulated, upon the performance of which the sale and delivery of the coke to the defendant was to cease to be optional with the coke company. And this construction put on the original agreement by the parties themselves

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in express terms is emphasized by the fact that they all along, after condition performed, treated the contract as mutually and absolutely binding; and their declarations and conduct would certainly suffice to remove any doubt there could possibly be as to the absolute contractual duty of the coke company to deliver and of the furnace company to receive the quantity of coke specified in the writings.—*Comer v. Bankhead*, 70 Ala. 141.

But the writing of January 30, 1888, is more than a mere construction of the previous agreement; it is itself an undertaking, absolute in form and substance, on the part of the coke company to sell and deliver, and on the part of the furnace company to take and pay for, all of the 3,900 cars of coke mentioned in the first paper, except 66 cars which had previously been delivered. It is therein unconditionally stipulated that the deliveries contracted for in the writing of August 30 should be postponed for a certain time, and that said deliveries should again commence about the first day of May, 1888, and thence continue at the rate of about ten cars per day until the whole quantity—3,900 cars, less the 66 cars previously delivered—should be delivered. We do not hesitate to declare, upon the considerations to which we have adverted, that there was an existing and mutually obligatory contract between the parties at the time of the alleged violation of it by the defendant, in July, 1888, for the sale and delivery of the specified quantity of coke.

2. We are equally free from doubt to the conclusion that there is no question of agency between the coke company and the furnace company in this transaction. It is manifest, we think, as well upon the words of the writings, as from the situation and course of dealings between these companies, that the coke company was in no sense the agent of the furnace company to purchase coke from the operators for the latter, but was itself the seller on its own account of the coke to the furnace company. And we deem it unnecessary to further discuss this feature of the case.

3. As has been indicated, one of the prominent questions on the trial below was as to whether, under the contract, the duty of paying freight on deliveries of coke at Sheffield was upon the furnace company or the coke company; the former contending that it was not required to make any payment whatever until the 10th of the

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month succeeding that in which deliveries were made; and the latter insisting that, by the terms of the contract, as read in the light of a custom of the trade, which the court allowed to be proved against defendant's objection, the furnace company was required to pay the freight charges on each car as it was received at Sheffield, and was entitled to a credit for the amounts so paid in any month on a settlement on the 10th day of the next month. There are only three provisions or expressions in the writings which bear upon this matter. In the out-set the contract provides for a sale and purchase of "Flat Top Coke at \$5.10 per net ton (2,000 lbs.) f. o. b. cars, Sheffield, Ala." It also contains this provision: "Buyers to remit on or before the 10th day of each month for all shipments made during the preceding month." And this recital: "It is understood that Hull Coal & Coke Co. have freight rates to Sheffield, Ala., on which the above price is based, but, if during the time this contract is in force, this rate should be advanced, then buyers have the option of taking any undelivered portion, due on this contract, at the advance, or of cancelling it, provided sellers do not elect to stand said advance." The trial court admitted evidence of a general custom in the coke trade, in line with plaintiff's contention, to the effect that under contracts like this it was upon the buyer to advance the freight, and take a credit for the aggregate of such bills paid during a month on settlement the 10th day of the succeeding month; and upon the writings and this extrinsic evidence submitted it to the jury to determine what the contract was in this regard. The action of the court on this subject clearly and confessedly can be sustained only on the assumption that the expressed or implied terms of the contract as reduced to writing were ambiguous in respect to this matter. We think this assumption is not justified by the language the parties have set down in the writings. It was mainly if not entirely rested upon the use of the letters, "f. o. b." in the connection shown above: these were supposed to be of such doubtful meaning as to authorize and require a resort to extraneous evidence in their interpretation. We do not so understand the principle on which the court acted. These letters have long been used and have now come into such general use in contracts of sale, where the property sold is to be transported, that their

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significance is a matter of common knowledge, and, hence, of judicial cognizance. It is commonly known, and therefore courts must be held to know, that these are but the initial letters of three several words, and that these words, in connections like this, are "free on board." And even were it conceded that courts do not judicially know what they stood for and mean, and evidence *aliunde* is resorted to as in this case, such evidence could go no further than to supply the missing letters of the words, of which these letters are by such evidence shown to be the initials. The necessity, in other words, to show by extrinsic evidence what the full words are is met when the completed words are put before the court, and it affords no occasion or justification for giving, by proof of custom or usage, or other extrinsic fact, a different meaning or operation to them than would have attached to them had they been originally inserted in full in the writings. Thus in a case where parol evidence was admitted to show that the letters C. O. D., (and which are not better understood than the letters f. o. b.), in a receipt given by an express company for a package to be transported by it, were the initials of the words "collect on delivery," the court held, these words being proved, it was not competent to prove by parol what the full words meant, or to change their natural significance and effect in the case by evidence of custom or usage, or of previous dealings between the parties, so as to relieve the carrier from the duty of collecting the price of the goods from, before delivering them to, the consignee.—*American Express Co. v. Lesem et al.*, 39 Ill. 312. And in another case, where the carrier, the Adams Express Co., was under a contract to carry goods from New York to Boston, the package was marked thus: "A. King, Windsor. N. S., C. O. D. \$375, from Turner's Express, Boston, Mass.," and in the receipt given for the goods was contained the directions as marked on the package. The package was delivered to Turner's Express at Boston by the Adams Express Co. without collecting therefor. The consignor sued the latter company alleging a breach of the contract, and on the trial "the defendant was allowed to prove that the whole direction meant, that Turner's Express should collect of the consignee; also, what was the custom existing among express companies receiving packages with a C. O. D. from connecting lines." It was

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held by the Court of Appeals that the admission of this evidence was erroneous; that while it was competent to give parol evidence to explain the meaning of the letters C. O. D., and thus remove all ambiguity, the contract, being thus made clear, could not be varied; that the additional words, being of familiar and ordinary and not of technical use, and having a well defined meaning, could not be explained or varied, or a different meaning given them, nor was it competent to prove a custom or usage inconsistent therewith."—*Collender v. Dinsmore*, 55 N. Y. 200. As has been indicated, our own opinion is, that the meaning of the letters C. O. D. in express carriage contracts, and f. o. b. in contracts like that involved in the case at bar is a matter of judicial knowledge, and that parol evidence is not needed or admissible in their interpretation.—*State v. Intoxicating Liquor Co.*, 73 Me. 278; *U. S. Ex. Co. v. Keefer*, 59 Ind. 263; *Moseley's Adm'r. v. Mastin*, 37 Ala. 216. But whether the words of which the letters are initials are filled in by drawing upon judicial knowledge or by extrinsic evidence, the effect and result are the same: the perfected words, in either case, are inserted in the writing instead of the letters, and the instrument is to be read and construed precisely as if the words had been originally embodied in it. Applying these principles to the present case, the words "free on board" are substituted for the letters f. o. b., and we have a contract by which the coke company agrees to sell to the furnace company 3,900 cars of coke at \$5.10 per net ton of 2,000 pounds free on board the cars at Sheffield, Ala. There can be no doubt as to what these words—free on board—mean in the connection we find them here. Their meaning in contracts of this sort is plain and well understood. They import that the purchaser shall be free from all expense which may have attended the shipment and transportation to the point named. Had the provision related to the initial point of the transportation, the buyer would have been entitled to the shipment at that place free from all expense incident to loading the cars—all expense indeed incurred in the premises up to and including the loading of the cars. Then it would have been upon the buyer to pay the freight—the cost of transportation—to the final destination of the consignment. The provision here having relation to the point of final delivery, it can mean nothing

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ing else than that the seller is to pay all costs and charges up to that point, and that the buyer is entitled to receive the consignment free of all such costs and expenses. And, as we have seen, these plain terms of the contract can not be changed or varied in any way by evidence of a custom existing in the coke trade, according to which the purchaser is to pay freight charges. There is, therefore, no consideration referable to the use of the letters f. o. b. which inject an element of uncertainty into the contract, or afford any ground for parol evidence in explanation of them or of the words for which they stand. The other terms of the writings bearing on this point are equally free from ambiguity and equally exclusive of the construction sought to be put upon the contract by the evidence of custom which the court allowed to go to the jury. The price to be paid was \$5.10 per net ton of 2,000 lbs. This was the *price of the coke*—the amount to be paid for each ton of the commodity—on cars at Sheffield, Ala. There is no more suggestion of freight charges in this provision of the contract, than there would have been had the coke been stored at Sheffield and as stored sold by the coke company to the furnace company at a specified price per net ton. In each case the cost of transporting the coke from the ovens to Sheffield would be a constituent element or factor to be considered by the seller in fixing a price to be proposed to the would be buyer, just as the price paid by the seller to the operators for the coke at the ovens, and as the value of the seller's time and services spent and rendered in buying, shipping and delivering the coke would be constituent factors, going along with freight charges and the amount of profit the seller sought to make, in the gross sum of \$5.10 per ton; and there is, on the stipulations so far considered, just as much reason and no more for holding that the furnace company was required to pay in advance of the 10th of the succeeding month, or that it was doubtful whether the contract did not require the furnace company to so pay that part of the \$5.10, or so much of the \$5.10, as was necessary to pay the operators what they were to receive for the coke at the ovens; and so with the coke company's profit and the value of its time and services. If this needs further demonstration it is found in the recital of the contract, that "It is understood that Hull Coal &

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Coke Co. have freight rates to Sheffield, Ala., on which the above price is based." And if it is to be held that the duty of thus paying freight can be imposed upon the furnace company by extrinsic evidence of custom it might with equal propriety be held that such duty in respect of every other item going to make up the aggregate price could in like manner be imposed upon that company to the most flagrant violation and complete emasculation of the provision of the contract—the only stipulation it contains on that subject—requiring payments to be made on the 10th day of each month for all shipments made during the preceding month. The payments thus required are of the price per ton of the coke—the whole price of \$5.10, no more and no less; and there is no warrant in the contract for saying that it requires the payment of this price less in each instance that part of it which is constituted of freight charges, or that it is doubtful and uncertain on the words of the writings whether another amount than this gross price was to then be paid. We are constrained, therefore, to hold that the circuit court erred in the admission of testimony as to the custom proved against defendant's objection, and in the charges given on this subject. The trial court should itself have construed the contract, and ruled that under it there was no duty resting on the furnace company to pay freight at all, or to pay any part of the contract price until the 10th day of the month succeeding shipments.

4. Whether the contract was changed in the respect considered above by a subsequent binding agreement between the parties is a different question, which was for the determination of the jury upon the evidence and instructions of the court. There was evidence tending to show that Woodson, subsequent to the making of the contract, agreed to pay freight on shipments as received, that he represented the furnace company in this regard, and that said company thereafter paid freight for a considerable period, several months, and upon all the coke which was delivered to it, amounting to 516 cars, without further objection. But we can not know what conclusion the jury would have reached or did reach on this part of the case, nor indeed that they reached any conclusion in this regard, and hence we, of course, can not say that the errors committed by the court in respect of

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the written contract were without injury to the defendant. One conclusion open to the jury in this connection was, that the defendant at plaintiff's instance voluntarily paid the freight on shipments that were received, that is the jury might have reached that conclusion; and if such payments were made as a matter of voluntary accommodation to the plaintiff, the fact of their being so made for a time did not bind the furnace company to continue payment, nor relieve the coke company from the duty of payment. Charge 1 requested by the defendant should, therefore, have been given.

5. It is next to be considered whether by the terms of the written contract the furnace company was entitled to the benefits of reductions in freight rates occurring after the contract was executed, and while it was being performed. We will repeat here the only provision of the writings which bears upon this point: "It is understood that Hull Coal & Coke Co. have freight rates to Sheffield, Ala., on which the above price is based; but if during the time this contract is in force this rate should be advanced, then buyers have the option of taking any undelivered portion due on this contract at the advance, or of cancelling it, provided sellers do not elect to stand said advance." Without this provision there was, as we have held, an absolute liability resting on the furnace company to take and pay for 3,900 cars of coke at the rate of \$5.10 per net ton. Of course the mere fact here recited that the sellers have freight rates to Sheffield, upon which this price is based, can add nothing to nor take anything from, nor in any manner change, the absolute liability of the furnace company to pay this price. And so far as the fact itself goes, not depending on the recital for its existence, the contract is now the same as if it had not contained the recital at all. But the recital of the fact, aside from its existence, was actuated by a purpose which clearly appears by what follows it. This purpose was to provide what should be the rights of the respective parties in relation to abandoning, or continuing under, the contract in the event and only in the event there should be an *advance* in the existing freight rates to which the recital referred, the provision being that in such event the furnace company should have the option of taking the then undelivered portion of the coke contracted for by paying

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such advance in addition to the \$5.10 per net ton, or of cancelling the contract as to such undelivered part, unless the sellers should elect "to stand said advance." And it is not conceivable how these stipulations in the writing expressly referring and confined to an *advance* in the freight rates, and without which obviously the contract required the coke company to deliver and the furnace company to take and pay for 3,900 cars of coke at \$5.10 per ton whatever the freight rates were or might afterwards be, whether higher or lower than existing rates, could be converted into a provision, or afford ground for argument or inference leading to the conclusion, that in the event of a *reduction* of such rates—a matter not hinted at in the instrument—the furnace company was to have the benefit of such reduction in the price per ton agreed to be paid by it, which being denied to it, that company had the right to repudiate the contract. In all reason, it would seem most clear that, if the parties had had any such intention, they would most certainly have expressed it in the writings, and that while stipulating for certain exceptional rights in the event of an advance in the rates, they would, had any such purpose been entertained, have also stipulated for the right now asserted by the furnace company in the event of a reduction in the said rates. That they did not so stipulate is conclusive to our minds, on the familiar maxim of *expressio unius exclusio alterius*, that they never had such a purpose, and that the contract is not open to any construction which admits of the effectuation of the right now insisted on by the defendant. The contract in this particular may have been a most disadvantageous one for the defendant, but it was competent for the parties to so obligate themselves, and it is not for the court to construe their contract by reference to that consideration.

The inquiry whether there was a subsequent parol agreement between the parties by the terms of which the defendant was to have the benefit of freight reductions was properly submitted to the jury on the trial.

6. It appears from that part of the correspondence we have copied that on July 23d, 1888, the furnace company notified the coke company that it would no longer be bound by the contract, claiming that the refusal of the latter company to deliver coke, unless the former

would pay freight at times of delivery, was a violation of the agreement, and released the furnace company from all obligations under it. This position was well taken, unless the evidence satisfied the jury that the original contract, evidenced by the writings, had been efficaciously modified by a subsequent obligatory agreement on the part of the furnace company to thus pay the freight. If the jury found this to be the case, then it is manifest that this renunciation was a breach of the contract, entitling the coke company to an immediate action upon it. That company did not immediately elect to treat the renunciation as an actionable breach of the agreement, but on the following day notified the furnace company that it would continue shipments and pay freight itself provided the furnace company would pay the stipulated price, waiving its claim as to freight reductions. This offer was declined. It is now contended that the plaintiff waived defendant's renunciation, and that, of consequence, whatever conclusion the jury may have arrived at in respect of the duty to pay freight, defendant's assertion that it was released from, and notification that it would no longer be bound by the contract was not a breach of the contract, because not accepted and treated as such by the plaintiff. It is admitted for appellee that the promisee may elect to treat such a breach as inoperative, and that by so doing he keeps the contract alive for the benefit of the other party as well as his own; but it is insisted, and we think the proposition is a sound one, "that, if the party renouncing will not and does not accept the offer of the other party to waive the renunciation, and refuses all such offers and negotiations, the party renouncing can not complain that the other party does finally accept and act upon the original renunciation." The pretermission of a present acceptance of the renunciation was in effect upon a condition which was not complied with by the defendant: the plaintiff in substance said to the defendant that, if you will continue to pay \$5.10 per ton for the coke, I will waive your renunciation and keep the contract alive, but I do this only on the condition named. This condition not having been met, the plaintiff's intended waiver was as non-existent as if it had never been attempted, and the right to accept the renunciation, and thus put an end to the contract was the same as if an abortive effort to avoid that

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necessity had not been made. We are, therefore, of the opinion that, if the defendant was, by virtue of some agreement subsequent to the written contract, to pay freight charges, its refusal to proceed in the performance of the contract, unless the plaintiff would pay these charges, was a breach of the contract which was not waived by the plaintiff. For this breach the plaintiff would be entitled to recovery, even if it be conceded that defendant was entitled to freight reductions. And on the other hand, if the defendant was not entitled to such reductions, but was under no duty to pay freight, its refusal to go on with the contract, the plaintiff paying freight, unless the freight reductions were allowed to it, was in itself an actionable breach as to which there is no pretense of waiver. So that, we concur in the view, given in charge by the trial court, that plaintiff was entitled to recover on either of these breaches, if the jury found either was a breach, and that the defendant could not recover unless it should be found both that it was under no duty to pay freight, and that it was entitled to scale the contract price of \$5.10 to the extent of reductions of freight rates subsequent to the execution of the contract.

Many exceptions were reserved to the rulings of the circuit court on the admission of testimony. These went for the most part to the correspondence between the parties through their respective officers and agents. The only plausible exception taken in this connection had reference to certain communications sent by one Woodson, on the theory that he was not authorized to speak for the furnace company. We think the evidence as to his relations to the company and to the matters about which he assumed to speak in the company's behalf, was sufficient to show, *prima facie*, at least, that he acted with authority, and that the evidence of what he did was properly allowed to go to the jury. The remaining exceptions to the admission of testimony are without merit, except those which are covered by what is said in the foregoing opinion.

For the errors adverted to the judgment of the circuit court must be reversed. The cause will be remanded.

Reversed and remanded.

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*Action against Railroad Company by an Employé to recover
Damages for Personal Injuries.*

1. *Pleading; averments in single count of separate causes of action, and several averments of one cause of action; evidence to sustain such counts.*—Where a single count contains several distinct, independent averments, each presenting a substantive cause of action, proof of either cause of action, so averred, will authorize a recovery; but where a count contains several averments, all of which, combined together, make up the averment of but one cause of action, it is necessary to prove each of the averments in order to sustain the cause of action as laid.

2. *Redundancy in complaint.*—Mere redundancy will not vitiate a complaint; the redundant portion may be either stricken out or rejected as surplusage.

3. *Section foreman of a railroad; his duties.*—A section foreman of a railroad is not a person in charge of a switch, within the meaning of subdivision 5 of section 2590 of the Code of 1886, in the sense that it is his duty to see that it is properly opened or closed; his duty is rather that of a superintendent under subdivision two of said section, to superintend and see that the ways, works, machinery and plant are kept in order.

4. *Person in charge or control of a switch.*—If no person has been specially appointed to the duty of opening and closing a switch, and a spur track, connected with the main line of such switch, is in constant use in order that trains may pass each other, and the engineers and conductors are provided with keys to the switch for that purpose, such persons, *pro hac vice*, are in charge of the switch within the meaning of the statute.

5. *Action for negligence of persons in charge of switch; sufficiency of evidence to submit question to jury.*—Where, in an action against a railroad company for personal injuries to an employé caused by a train going through an open switch, there is a count in the complaint charging negligence on the part of persons in the employ of the defendant, who had charge of the switch, in leaving it open, and there was evidence that the switch was provided with a suitable lock, that the section foreman, conductors and engineers each had a key, that the switch was used about 30 minutes before the accident, and the engineer then using the switch testified that it was properly secured be-

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fore he left it, there was sufficient evidence to submit to the jury plaintiff's right to recover under such count.

6. *When averment of two acts of negligence constitutes but one cause of action; evidence to justify recovery under such count.*—Where in an action against a railroad by employé for injuries resulting from a train running into an open switch, it is averred in a count of the complaint that the injuries were caused by the negligence of defendant's employés, who had charge of the switch, in failing to properly secure it, and by the negligence of persons in defendant's employ, who had charge of the train, in failing to properly supply it with equipments for bringing it to a quick stop, by reason of which failures said switch did come open, such count contains but one cause of action, based upon the co-operating negligence of the two classes of persons; and without the proof of negligence of both there can be no recovery under the count.

7. *Dummy railroads subject to same rules as to use of safeguards and appliances as ordinary railroads.*—Corporations or persons operating dummy lines engaged in running both passenger and freight trains, that have regular stations and section foremen, and use engines capable of great speed, and which traverse a large section of country, are required to observe the same rules and regulations and adopt and use such appliances and safeguards as are in use and deemed necessary by well regulated railroads of the ordinary character. (*Birmingham Ry. & Elec. Co. v. Allen*, 99 Ala. 859, followed.)

8. *Action against railroad company; relevant evidence.*—In an action for injuries to a railroad employé caused by the train on which he was employed running through an open switch, where there was evidence that locks had been used on defendant's switches for six months and other evidence that a lock had never been put on the switch in question, the evidence of a witness that he was employed by defendant up to two months before the accident, and that there were then no locks in use on the road, is relevant and admissible.

9. *Same; conclusion of witness.*—In an action for injuries arising from a train running through an open switch, the engineer of the train which had been the last to pass through the switch previous to the accident, can not testify that the switch was secure when he passed through it, without first stating its condition and how it was secured.

APPEAL from the Birmingham City Court.

Tried before the Hon. W. W. WILKERSON.

This was an action brought by the appellee, through his next friend, against the appellant corporation; and sought to recover for personal injuries alleged to have been caused by the negligence of the defendant.

On the examination of J. J. Kennedy, as a witness for the plaintiff, he testified that he was a locomotive en-

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gineer and had been about fourteen years; that the plaintiff was injured while running as fireman on the same dummy on which he was engineer. After testifying as to the accident which resulted in the injury to the plaintiff, he testified that he examined the switch after the wreck, and it was at that time open to the side track, and was all right except for the absence of a switch lock; but that there was no one at the switch to undertake to signal that there was danger from the switch being open. The plaintiff then asked the witness the following question: "I will ask you if you know what the custom is of well regulated railroads as to the manner of securing switches?" The defendant objected to this question on the ground that the witness was not shown to know the custom upon the kind of railroad or dummy line that was operated by the defendant, and upon which plaintiff was injured. The court overruled the defendant's objection, and defendant duly excepted. The witness stated that he knew what the custom was upon well regulated railroads, and that the custom was to have locks on the switches. The defendant also moved to exclude this answer on the same grounds, and duly excepted to the court's overruling this motion.

On the examination of L. M. McLemore, as a witness for the plaintiff, he testified that he had been in the employ of the defendant, and knew the location of the switch at which the accident occurred; that he did not know whether there was a lock on said switch when he was running on the train of the defendant; that he did not see any, and that two months before the plaintiff was injured he ran into the same switch. The defendant moved to exclude that portion of this witness' testimony in which he testified that two months before the accident he ran into the switch at the place of the accident; but the court overruled the defendant's motion, to which ruling the defendant duly excepted.

The defendant introduced as a witness one William Dill, who testified that he was an engineer on the defendant's road, and that on the night of the accident he passed on to the side-track, at the switch where the accident occurred, for the purpose of letting the engine on which the plaintiff was fireman pass by, going on to Bessemer, which was about 30 or 40 minutes before the accident occurred; that after this train had passed on he moved

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out of the side-track on to the main line, and went on to Birmingham. The defendant then asked the witness the following question: "Tell the jury the condition of the switch after you moved out, whether it was safe or not?" Plaintiff objected to this question, in that it called for a conclusion of the witness, which objection the court sustained, and the defendant duly excepted. The defendant then asked the witness to "state whether it would be reasonably safe for a train to pass over the switch left as you left it that night?" The court sustained the plaintiff's objection to this question, and the defendant duly excepted.

The defendant requested the court to give, among others, the following written charges, and separately excepted to the court's refusal to give each of them as asked: (4.) "I charge you that the law does not require the defendant to use the latest improvements or inventions in the operation of its road, but that the law is satisfied if the switch is reasonably safe for its employes; and I charge you that if you believe from the evidence that, on the morning of the accident, the defendant's switch was reasonably safe if properly used, you must find for the defendant." (5.) "If you believe from the evidence that on the morning of the accident the section boss left the switch locked in the condition testified to by witness Aldrich, and that he did not have occasion, and that his duties did not require him, to examine the switch afterwards during the day, and that he did not know but that the switch was locked at the time of the accident, then you must find for the defendant upon the first and second and third counts of the complaint." (16.) "I charge you that, under the evidence in this case, you must find in favor of the defendant."

The other facts pertaining to the questions considered by this court on the present appeal are sufficiently stated in the opinion. In accordance with the verdict of the jury, there was judgment for the plaintiff assessing his damages at \$2,300. The defendant appeals, and assigns as error the rulings of the trial court upon the evidence, to which exceptions were reserved, and the refusal of the court to give the several charges asked by the defendant.

R. H. PEARSON and JOHN F. MARTIN, for appellant.

LANE & WHITE, *contra*.

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COLEMAN, J.—The plaintiff Baylor, a minor, sues by his next friend under the Employer's Liability Act, section 2590 of the Code, to recover damages for injuries sustained while in the employment of defendant as fireman. As the case must be reversed for causes hereafter considered, we deem it proper to consider the sufficiency of the complaint, lest our failure to do so, be construed as an admission that the complaint is free from error. It is proper to add, in justice to the trial court, that the defendant did not demur to the complaint, and trial was had upon the general issue. It is necessary to clearly understand and keep constantly in view the several causes of action as laid in each count, to test the correctness of the rulings of the court upon questions of evidence and instructions to the jury. We have heretofore declared many of the principles embodied in the Employer's Liability Act, and defined rules of pleading to be observed in framing the complaint, and pleas thereto. In the case of *Highland Ave. & Belt R. R. Co. v. Dusenberry*, 94 Ala. 413, 419, 10 So. Rep. 274, it was declared that, "when the plaintiff, in a single count, shifts his right of action, from one ground to another, and states several breaches of duty in the alternative, or disjunctively, so that it is impossible to say upon which of several equally substantive averments he relies for the maintenance of his action, then there is such confusion and obscurity as to the ground upon which a recovery is claimed that the defendant is not clearly informed of the matter to be put in issue, and a count so substantially variant and contradictory, is demurrable. * * * Inextricable confusion of issues would result from the blending in one count of a number of distinct breaches of duty as independent grounds of recovery, to be chosen from and relied upon at the election of the plaintiff. Perspicuity and certainty in his pleadings are not exacted of the plaintiff if he is permitted to put forward in one count several independent causes of action, stated in such ambiguous terms as to leave the defendant wholly in doubt as to what alleged breach of duty is really made the ground of the charge of liability." These rules were declared as applicable to the complaint then under consideration, an examination of which showed that several causes of action and distinct breaches of duty, arising under separate subdivisions of

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section 2590, were united and blended in one count, and in some instances averred in the alternative. The rule declared in the *Dusenberry Case* in regard to the pleadings was recognized in the case of *Kansas City, M. & B. R. R. Co. v. Burton*, 97 Ala. 240, 12 So. Rep. 90. In the case of *L. & N. R. R. Co. v. Mothershed*, 97 Ala. 261, 12 So. Rep. 714, referring to the *Dusenberry Case*, *supra*, we said: "It was not held, that when several causes of action averred and relied on for recovery arose under the same subdivision of section 2590 of the Code were stated separately, but not disjunctively, and each averment contained a substantive cause of action such a count was demurrable. A count of this character fully informs the defendant that each substantive averment is relied upon, and he may prepare his defense accordingly. Proof of either will authorize a recovery. The distinction must be kept in mind, where a single count contains several distinct, independent averments each presenting a substantive cause of action, and a count containing several averments all of which combined together make up the one cause of action averred. As to the former, proof of either will authorize a recovery, whereas in the latter it is necessary to prove each of the averments, in order to sustain the cause of action as laid." Mere redundancy will not vitiate a complaint. The redundant portion may be stricken out, or rejected as surplusage. Let us apply these principles to the several counts of the complaint, and also examine the ruling of the court upon the several instructions refused, with reference to the evidence as applicable to the several counts. The negligence charged in the first count is "of persons in the employment of the defendant who had charge of the switch * * * in leaving said switch open" &c. The cause of action here averred is that given by subdivision 5 of section 2590. The question arises, as to who was in charge of the switch, and what is meant by "charge or control of a switch?"

The defendant introduced evidence as follows: "Mr. Aldrich had charge of looking after the switches and keeping them in order; he was the section boss or road master. Aldrich was the man that looked after the switches. The sections were seven or eight miles." Turning to Aldrich's testimony, and he states that he was section foreman, that he went his rounds the morn-

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ing of the day on which plaintiff was injured at night. "I did not have occasion to pass there any more during the day; I had no notice of or reason to think that the lock had been taken away up to the time that Baylor was hurt." We do not think the section foreman was a person in charge of the switch in such sort that it was his duty to attend to and watch the switch and see that it was properly closed or opened. His duty was rather that of a superintendent under subdivision 2, and he was required to superintend and see that the ways, works, machinery and plant, so far as these terms embraced his duties, were kept in order; and if it could be said that he was in charge of the switch in any sense, it would be for this purpose, and not for the purpose of attending to the closing or opening of the switch. See *Burton's Case*, *supra*. No special person was put in charge of the switch, and yet we are satisfied that, under the evidence, there were persons in charge of the switch, within the meaning of the statute.

The evidence for the defendant is that the switch was provided with a suitable lock, and that the section foreman, conductor and engineer, each were provided with a key to this lock. If the foreman, Aldrich, was not charged with the duty of attending to the opening and fastening of the switch, and no one was specially appointed to this duty, and the spur track, connected to the main line by this switch, was in constant use in order that the trains might pass each other, and the engineers and conductors were provided with keys for this purpose, there is no other conclusion open, but such persons, *pro hac vice*, were in charge of the switch. The evidence shows that William Dill, an engineer in charge of an engine, used the spur track about thirty minutes before the accident. True he testifies that he saw that the switch was properly secured (not shown to be locked) before he left it, but the evidence is conclusive, that the next train passing along, and upon which plaintiff was injured, left the main track and went through the switch on the spur track in about thirty minutes afterwards. We think there was sufficient evidence to submit to the jury plaintiff's demand under the first count of this complaint. There was no error in refusing the 4th, 5th and 6th charges requested by the defendant.

We come now to the second count, and this count brings

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up for consideration the principles of pleading referred to in a former part of this opinion. It is averred in this count that the injury was caused by "the negligence of persons in the employment of the defendant, who had charge of the switch, * * in failing to properly fasten or secure said switch so that the same would not come open, and by reason of the negligence of persons in the employment of the defendant, who had charge of said train, to properly supply it with equipments for bringing the same to a quick stop, by reason of which said failures [plural] said switch did come open, thereby," &c. "Plaintiff avers that he was aware that persons superior to him engaged in the service or employment of the defendant knew that said switch was not properly fastened or secured, and that said train was not properly equipped for coming to a quick stop," &c. This count considered as a whole is very confused. The negligence first charged consists in a failure to "properly fasten or secure said switch," and, as we interpret it, arises as in the first count under subdivision 5 of the act. The negligence next charged is the failure to properly supply the train "with equipment for bringing the same to a quick stop." This charge is for a defect in the ways, works, machinery or plant, and arises under subdivision 1 of the act, and it is averred that the failure to provide "equipments for bringing the same to a quick stop" was by reason of the negligence of the persons "who had charge of the train." The conductor had charge of the train at this time, and there is no averment nor proof that it was his duty to supply "proper equipments." Moreover, the act itself provides that the master or employer is not liable under subdivision 1 (for defect in the ways, works, machinery or plant), unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the master or employer, or of some person in the service of the master or employer and entrusted by him with this duty," &c. The count contains no sufficient averment to show a liability for negligence under subdivision 1. If we consider the words, "in failing to properly fasten or secure said switch so that the same would not come open," as referring to a defect in the switch itself, and, therefore, as charging a defect in the ways, works and machinery or plant under subdivision 1, so as to bring both

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charges under the same subdivision, and relieve it of the objection, that two substantive causes of action, arising under different subdivisions, are blended in one count, the count is objectionable for failing to make the necessary averments to show a liability under subdivision 1, in that the "defect arose from or had not been discovered or remedied," &c., as required by the act. We have said the count was not demurred to, but the general issue was pleaded. It becomes necessary to determine in what the cause of action charged in this count consists. We are of opinion, whether it be regarded as uniting a cause of action under subdivision 5 with one under subdivision 1, or whether as brought wholly under subdivision 1, the count does not contain two substantive distinct causes of action, proof of either of which will authorize a recovery; but it combines "the negligence of the person in charge of the switch, in failing to properly fasten or secure it," with the negligence of the person in "charge of said train, in failing to properly supply it with equipments for bringing the same to a quick stop," and the negligence of the two co-operated and together made the one cause causing the injury. The count proceeds, "by reason of which said failures [both of them] said switch did come open," which caused the injury. The count further proceeds, "plaintiff avers that he was aware that persons superior to him engaged in the service or employment of the defendant knew that said switch was not properly fastened or secured and that said train was not properly equipped for coming to a quick stop," thus continuing to combine the two causes as contributing to make up the one cause charged as producing the injury. The rule is very clear, that to authorize a recovery under such a count, the plaintiff is required to establish the negligence as laid, and without proof of both, there could be no recovery under this count. There is not only no proof that it was the duty of persons in charge of the train to supply it with the "equipments" referred to, but there is an entire absence of proof, that there was any defect in the respect charged. The court, therefore, erred in refusing to give the second charge asked by the defendant, which requested an affirmative charge under this count. Pleadings should be brief, perspicuous and in an intelligible form. We think there is much room to improve the second count under these rules.

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As we construe the third count it was brought under subdivision 5. It is averred that the injuries were caused "by the negligence of some person in the employment of the defendant who had charge of the switch, * * in failing to have properly fastened or secured the said switch so that the same would not come open, * * the engineer in charge of said engine negligently failing to use all proper means and appliances to stop said engine so that," &c. From the reading of the count, we are unable to determine whether the pleader intended in this count, to aver that the negligence of the person in charge of the switch, and the negligence of the engineer, combined together, formed the one cause, which caused the injury. If it was intended to charge two distinct substantive causes of action, it was easy to frame the count in such manner as to be easily understood. If the pleader had averred, that the injuries were caused, first, by the negligence of the person in charge of the switch, in failing to properly fasten the switch so as to prevent it from coming open when struck by the train; second, by reason of the negligence of the engineer in charge of said engine, in failing to use proper means and appliances to stop said engine, &c., it would be readily understood. Other phrases or statements would do equally as well as the one suggested as an illustration.

No pleas were filed to the 4th and 5th counts. We presume the case was tried throughout upon the general issue. The 4th count charges a defect in the ways, works, machinery and plant in this, that the switch was without a lock by which it could be securely fastened and left; and this count also charges negligence in the engineer in the "rapid running of the train, and a lack of skill or proper effort," &c. If the purpose was to rely upon each as a substantive cause of action, that averred under subdivision 1, and that under subdivision 5, each independent of the other, good pleading would require a separate count for each. *Burton's Case, supra*. But if it was intended to charge the two as one cause, it should be clearly expressed. We have stated what is necessary in either case to authorize a recovery. We have also stated what averments are necessary to show a liability under subdivision 1. The 5th count charges the engineer with negligence in the rapid rate of speed at which the engine was run, as the cause of the injury.

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We can not tell what the evidence will be in this respect on another trial and will make no comments.

We know of no reason why corporations or persons engaged in operating dummy lines, like that of the defendant, should not be required to observe rules and regulations and adopt and use appliances and safe guards, which are in use and deemed necessary by well regulated railroads of the ordinary character. The evidence shows that the engines of defendant are capable of great speed, that it is engaged in running both passenger and freight trains, has regular stations and section foremen, and traverses a large section of country. We considered the responsibility of those operating dummy engines to some extent in the case of *Birmingham Min. R. R. Co. v. Jacobs*, 92 Ala. 187, 199, 9 So. Rep. 320; and in the more recent case of *Birmingham Railway & Elec. Co. v. Allen*, 99 Ala. 359, 13 So. Rep. 8, one cause of action charged was the negligence of the defendant in failing to provide locks for switches, and we held, there could be no difference in the application of the principle to dummy engines and engines of the ordinary character.

There are two assignments of error based upon exceptions to the ruling of the court as to the admission and rejection of testimony. There was no error in permitting the witness to state the condition of the switch two months prior to the injury. One of the disputed questions was whether the defendant had ever supplied the switch with locks. There was evidence tending to show that locks had been continually used for a period of six months with the exception of two or three days. The witness testified that he was in the employ of defendant up to two months before the injury, and there were no locks in use. There was other evidence from which a jury might infer that a lock had never been put on this switch, while there was evidence offered by defendant to the contrary. In fact the section foreman testified he locked the switch on the morning of the day of the injury. These disputed facts can be determined only by the jury. It was not proper for the witness, William Dill, to state in the first instance, that the switch was safe after he moved out from it. It was proper to permit him to state its condition, how it was secured, and then state whether or not it was secure. The evidence showed that he was competent as an expert

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to give his opinion. Whether, it was negligence *per se*, not to provide locks for switches under the evidence in this case, was a question for the jury. This record shows that one of defendant's witnesses, J. B. Downey, a master mechanic, testified that "The switches are not safe unless they are locked down; the jostling of the train throws them over." There is other evidence in conflict with this testimony. The truth must be ascertained by the jury.

The plaintiff, his mother, and stepfather are all living. It will be an easy matter on another trial to furnish the necessary proof, if it exist, to show that plaintiff may recover for time during his minority.

We have given this case careful consideration and think we have said all that is necessary, in order to have the pleadings put in proper form for another trial, and for a just determination of all the questions which will arise.

Reversed and remanded.

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Bill in Equity to enforce Specific Performance of a Contract for the Sale of Land.

1. *Maintenance; subordinate possession by vendor.*—Where one, who is in possession of lands under a contract of purchase, executes a mortgage thereon, a conveyance of said lands under a foreclosure sale as provided in said mortgage, and a deed from such purchaser to another are not void for maintenance as against the original owner, who, after the death of his vendee under the contract of sale, took possession of the lands and received the rents therefrom; the possession of the lands and the pernaney of the rents by the original owner and vendor being presumed to be subordinate to the equitable title of his vendee's mortgagee and those claiming under him.

2. *Bill to enforce specific performance; failure to aver when purchase money payable.*—When a contract of purchase stipulates that the vendor will convey the lands when the "vendee pays or causes to be paid" the purchase money, and that the contract was based on a note then executed by the vendee and another note he would thereafter execute for the purchase money, a bill filed by one claiming under the vendee against the administratrix of the vendor to enforce the specific

101	499
108	541
108	438
109	264

101	499
112	113
112	544
101	499
119	200

101	499
108	429
121	547

101	499
129	625
101	499
180	538

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performance of said contract, which avers that complainant does not know whether the notes were ever executed, and makes no other averment as to when the contract was to be performed by the vendee paying the purchase money, is not open to demurrer on the ground, that it fails to show when the purchase money was payable, since the complainant could assume that the contract was to be performed by the vendee within a reasonable time.

3. *Same; insufficient demurrer.*—Although in such a bill, an averment that the “complainant does not know whether the notes were ever executed or not” is insufficient to excuse a more specific averment of the terms of a contract, in that it does not show that complainant had done what he ought to have done to inform himself in the premises, a demurrer on the ground that “the bill fails to describe the notes alleged to have been executed for the purchase money, or to show when same was due,” is not sufficient to raise this objection.

4. *Bill in equity to specifically enforce a contract; stale demand.*—A demurrer to a bill, filed by one claiming under the vendee in a contract of purchase to enforce the specific performance of said contract, on the ground that the “alleged right of complainant is stale,” is based on the ground that a demand or claim by the complainant has not been asserted for so long a time that the court is without equity to enforce it; and does not raise, as an objection to the maintenance of the bill, that the complainant has so acquiesced in the assertion by the vendor and his personal representative of possession of the land, and a retention by them of the rents and profits, that a court of equity, in the discretionary exercise of its jurisdiction to enforce an executory contract, will not lend its aid to the enforcement of the contract involved in such suit.

5. *Bill to enforce the specific performance of a contract of sale; tender of deed before filing bill not necessary.*—It is not essential to the maintenance of a bill for the specific performance of a contract of sale, that the complainant, who is the vendee, should offer to perform or tender a deed before filing the bill; a failure to do so affects only the question of costs.

6. *Vendor in possession accountable for rents and profits.*—A vendor of land, who has retained title and taken possession, and has bound himself to convey on payment of the purchase money, is accountable to the vendee or his assignee for rents and profits arising from said lands, to the same extent that a mortgagee in possession is accountable to the mortgagor.

APPEAL from the Chancery Court of Montgomery.

HEARD before the Hon. JERE N. WILLIAMS.

The bill in this case was filed on June 11, 1892, by the appellant, James V. Ashurst, against the appellees, and prayed for the enforcement and the specific performance of a contract

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of purchase. The averments of the bill are sufficiently stated in the opinion. The defendant demurred to the bill on the following grounds: "1st. Bill and exhibit thereto show that the relation of mortgagor and mortgagee did not exist between Charles F. Ashurst and A. B. Peck, but that the relation was that of vendor and vendee. 2d. Said complainant on the facts stated in the bill has no right to redeem. 3d. The exhibits attached to the bill disclose an unconditional executory contract of sale from A. B. Peck to Chas F. Ashurst, and said transaction can not be held a mortgage at the instance of the complainant. 4th. And these defendants demur specially to so much of said bill as seeks to have an accounting of the rents and profits of said lands, or the use or occupation thereof, and for grounds of demurrer assign the same grounds, severally and separately as are above assigned to the whole bill. 5th. The bill, as one for specific performance, is insufficient in showing that the complainant had ever offered to perform his part of the contract. 6th. The bill fails to show that any tender was ever made to defendant's administrator of the amount due. 7th. The bill fails to show that any deed was ever tendered to either of the defendants for execution. 8th. That it appears by the bill of complaint, that at the time the complainant acquired the interest in the lands upon which he predicates his bill, said lands were adversely held. 9th. The bill fails to describe the notes alleged to have been executed for the purchase money, or to show when same were due. 10th. The equity of redemption was cut off by the foreclosure of the mortgage, and the statutory right of redemption was barred before the bill was filed. 11th. The alleged right of complainant is stale. 12th. The complainant's right to redeem is barred by the statute of two years."

Upon the submission of the cause upon the demurrer, the chancellor sustained it; and his decree in this behalf is here assigned as error, on the present appeal by the complainant.

BRICKELL, SEMPLE & GUNTER, for appellant.—The relation existing between A. B. Peck and Chas. F. Ashurst resulting from the agreement of sale was that of vendor and vendee.—*Micou v. Ashurst*, 55 Ala. 607; *Spies v.*

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Price, 91 Ala. 166, 8 So. Rep. 405; *Moseley v. Moseley*, 86 Ala. 289, 5 So. Rep. 732.

When, as in this case, the vendor stipulates to make title on the payments of the purchase money at a future day, the court pursuing its own maxim of looking upon and treating that as done, which ought to have been done, or which the parties contemplate shall be done in the final execution and consummation of the contract, for most purposes regards the contract as specifically executed. The vendee is the equitable owner of the land—the vendor is the owner of the purchase money. To the land a trust attaches; of it the vendor is seized for the use of the vendee. The trust binds the land, while the legal estate remains in the vendor; and it will bind the heir or devisee succeeding to it, and every one claiming under the vendor, except a *bona fide* purchaser without notice; as land, the vendee may convey or devise it; and as land it is descendible to his heirs.—*Wimbish v. M. M. B. & L. Asso.*, 69 Ala. 575; *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Pomeroy on Contracts*, §§ 314, 315; 1 *Pomeroy's Eq.*, §§ 368–72; 3 *Pomeroy's Eq.*, §§ 1161, 1406; 2 *Story's Eq.*, §§ 789–90.

The possession by Peck after the death of Chas. F. Ashurst was presumed to be in subordination and subservient to the equitable estate of Chas. F. Ashurst's mortgagee, and therefore, subservient to the title acquired by the purchaser at the mortgage sale.—*Graham v. Nelson*, 5 Hump. 611; *Olwine v. Holman*, 23 Penn. St. 284. The right attempted to be enforced by the complainant was not a stale demand. The time of payment of the purchase money, or of making title, was not of the essence of the contract, and the enforcement specifically of the contract, at the instance of either party, is a matter of course, unless there be such a change of circumstances, as would render it inequitable.—*Chadwell v. Winston*, 3 Tenn. Ch. 110; *Edgerton v. Peckham*, 11 Paige, 352; *Waters v. Travis*, 9 Johns. 450; *Leaird v. Smith*, 44 N. Y. 618; *Morris v. Hoyt*, 11 Mich. 9; *Pomeroy on Contracts*, § 371, note, p. 444. The defendant was liable for the rents and profits that had been received while in possession of the property. While Peck and Charles F. Ashurst bore to each other the relation of vendor and vendee, and that relation is distinguishable from that of mortgagor and mortgagee, yet in this State it has long

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been settled that when the vendor of land retains the legal title covenanting or promising to convey it on payment of the purchase money, he carves out his own security which is in the nature of a mortgage, and to which all the essential incidents of a mortgage attach.—*Lowery v. Peterson*, 75 Ala. 109; *Bankhead v. Owen*, 60 Ala. 457; *Hightower v. Rigsby*, 56 Ala. 126; *Hughes v. Hatchett*, 55 Ala. 631.

If there were not allegations in the bill showing an offer on the part of the complainant to pay the purchase money; and if he were not excused from tendering a deed to the heirs of Peck, a failure in these respects would not be a cause of demurrer; it would affect only the question of costs.—*Stevenson v. Maxwell*, 2 Comst. (N. Y.) 408; *Bruce v. Tilson*, 25 N. Y. 194; *Morris v. Hoyt*, 11 Mich. 9; *Irvin v. Gregory*, 13 Gray 215.

J. M. CHILTON and J. M. FALKNER, *contra*.—The relation between A. B. Peck and Chas. F. Ashurst was that of vendor and vendee.—*Micou v. Ashurst*, 55 Ala. 607. The complainant being the vendee of the purchaser at the foreclosure sale, the mortgagee is not entitled to the relief prayed for, since the purchaser at the mortgage sale could not sell his interest in the property while it was adversely held by the defendants.—*Bernstein v. Humes*, 60 Ala. 583; *Coleman v. Hair*, 22 Ala. 596; *Pryor & Fisher v. Butler*, 9 Ala. 418; *Dexter & Allen v. Nelson*, 6 Ala. 68. The complainant was not entitled to maintain the present bill by reason of *laches*.—2 Leading Cases in Equity, White & Tudor's notes, Par 2, p. 1051, *et seq.* and cases there cited; Waterman on Spec. Perf., § 475; *Young v. Young*, 45 N. J. Eq. 27; *McWilliams v. Long*, 32 Barb. 194; *McDermid v. McGregor*, 21 Minn. 111; *Watson v. Reed*, 1 Russ. and Mylne 236; *Walker v. Jeffrey*, 1 Hare 348; *Eastman v. Plumer*, 46 N. H. 464, *Gentry v. Rogers*, 40 Ala. 442.

HEAD, J.—On the 22d day of November, 1886, W. T. Burney and wife, for the cash consideration of four thousand, two hundred and fifty dollars, sold and conveyed by deed to A. B. Peck the lands described in the bill. The bill avers that the purchase was negotiated by, and was really made for the benefit of, Charles F. Ashurst, who was the son-in-law of Peck, the latter agree-

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ing to convey the lands to the former upon being repaid the said purchase money with interest; and so it was, that by an instrument in writing executed on the 1st day of December, 1886, the said Peck, reciting the said purchase, agreed that when Ashurst pays or causes to be paid to him the said purchase money (which in this instrument is stated to be four thousand dollars) with interest at ten *per cent. per annum*, he would make to him, Ashurst, the same warranty title that Burney and wife had made to him, Peck; and it was further stipulated that it was understood that the contract so entered into was based on a note that Ashurst had that day executed to Peck, and another that he would thereafter execute, covering the said four thousand dollars with interest. Upon the consummation of the purchase, the bill avers, Ashurst went into actual possession of the land, and remained therein until his death, which occurred in the fall of the year 1887, exactly when does not appear. The complainant avers that he does not know whether either of the mentioned notes was in fact executed or not. The recital of the written instrument, however, must be regarded as ground for the assumption that the first one was in fact executed and delivered to Peck. The complainant avers that after the purchase, Ashurst made "some considerable payments" thereon to Peck, but he does not know the amount. On the 17th day of January, 1887, Ashurst conveyed, by way of mortgage, his interest in the land to Lehman, Durr & Co., to secure a large debt due in October, 1887, with power of sale, on default, in John W. Durr and Joseph Goetter, or either, who were members of said firm; and on the 1st day of April, 1889, Goetter, in conformity to the trust, executed the power and sold and conveyed the land, with other lands embraced in the mortgage, to Meyer Lehman for the sum of three thousand dollars. Afterwards, on the 15th day of February, 1890, Lehman conveyed the land to the complainant, James V. Ashurst, who immediately offered to pay to the administrator of said A. B. Peck, who died meanwhile, whatever balance there was due to the estate of said A. B. Peck on said purchase, but the administrator refused to accept the payment. The bill avers that on the death of Charles F. Ashurst, in the fall of 1887, said A. B. Peck took possession of the lands and received the crops and rents of 1887, amounting in value

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to one thousand dollars, or other large sum, and remained in possession thereafter until his death, receiving the rent of such portion as was rented, and enjoying the use of such portion as was not rented, and that since his death, the date of which is not averred, his administrator, W. D. Peck, as such, has remained in possession, receiving each year the rents, and enjoying the use, as his intestate had done, amounting to specified large sums; and it is insisted that the payments made by Charles F. Ashurst in his lifetime, and the said crops, rents and values of use and occupation received and enjoyed by Peck and his administrator since, are proper credits on the indebtedness owing by Chas. F. Ashurst. The bill is filed by said James V. Ashurst against the administrator and heirs of A. B. Peck to obtain specific performance of the contract of purchase. He prays for an accounting wherein he shall be allowed all just credits on said indebtedness, and offers and submits himself to pay whatever sum may be found due the estate of A. B. Peck thereon, and prays for a conveyance, and for general relief.

It is objected, by way of demurrer to the bill, that the relief sought can not be had by this complainant, for that the conveyance to Lehman, under the foreclosure sale, and his conveyance to complainant, are void for maintenance, because, upon the facts averred, which we have substantially set forth above, A. B. Peck, or his administrator, must be held to have then had possession of the land adversely to Lehman, Durr & Co. and Lehman. We are of opinion that the presumption, upon the facts as we find them stated, is that the possession taken and held by Peck and his administrator, when the occupancy of Chas. F. Ashurst was terminated by his death, was in subordination to the equitable title of the latter's mortgagees and Lehman claiming under them, until the refusal of the administrator to perform the contract took place. Upon entering into the contract of sale by Peck with Chas. F. Ashurst, equity treated Peck, the vendor, as the owner of the purchase money, and as trustee of the legal title to the land for the use of Ashurst, the vendee, and for his, the vendor's, security in the collection of the purchase money, by virtue of the lien which equity raises, in the nature of a mortgage, in favor of the vendor who retains in himself the legal title;

Ashurst, the vendee, being regarded as the real owner of the land, and as trustee of the vendor for the purchase money. The mere possession and pernancy of rents and profits by Peck and the administrator created no implication of hostile enjoyment. They were presumptively subservient to the equitable ownership, and it devolves upon him who would claim that such possession was, in fact, adverse, to aver and prove an assertion of actual hostility, so manifested as that actual knowledge thereof, or that which must be regarded as its equivalent, was carried home to the equitable owner.—*Wimbish v. Loan Association*, 69 Ala. 575; 1 Pomeroy's Eq., §§ 368-72; 2 Story's Eq., §§ 789-90, and other authorities cited on brief of appellant's counsel. The present bill may be taken as showing such an adverse assertion from and after the administrator's refusal to perform the contract, but not sooner.

It is argued by the appellees that the bill does not set forth, with sufficient certainty, the terms of the contract of purchase, in that it fails to show when the purchase money to be paid by Ashurst was payable. We have seen that the written agreement stipulates that Peck would convey when Ashurst "pays or causes to be paid" the purchase money; and further, that the contract was based on a note then executed by Ashurst, and another note he would thereafter execute covering the purchase money. The only reference in the bill to these notes is the averment that complainant does not know whether they were ever executed or not; and aside from this there is no averment when the contract was to be performed by the payment of the money on the part of Ashurst. It is averred that Ashurst made some payments before his death in the fall of 1887. The ground of demurrer upon which the argument is predicated is assigned in the following words: "The bill fails to describe the notes alleged to have been executed for the purchase money, or to show when same was due." It is obvious that the allegation of the bill above referred to, that complainant did not know whether the notes were ever executed or not, was intended by the pleader as the averment of an excuse for the absence of a particular statement of the terms of the contract in reference to the time stipulated for performance on the part of the vendee, if indeed there was such a stipulation. It is observed that

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the bill does not allege that there was such a stipulation further than it might be inferred there was such from that clause in the written contract, that a note had been executed, and that another would be executed covering the purchase money. What the tenor and effect of these notes were, or were to be, whether they expressed or were to express a particular time of payment does not appear either by recital of the contract or averment of the pleader. If the notes, both of them, were in fact executed, the presumption is that they were in the possession of Peck's administrator when this bill was filed; and if the complainant, as he alleges, did not, in fact, know whether they had been executed or not, and if he made all reasonable effort to inform himself as to their existence and effect without avail, we are of opinion that he would not be without remedy for specific performance of the contract because of his inability to aver affirmatively that time for the payment of the purchase money was or was not expressly fixed by the contract, and if so fixed what that time was; but we think, rather, that as the terms of the contract, so far as known to the complainant, are peculiarly made to appear in this transaction, the complainant, coming to his rights by assignment from the original vendee, would be justified in assuming, as he has, in effect, done in the present bill, that the contract was to be performed by the vendee within a reasonable time, and as much earlier as the vendee might choose to perform; at least until disclosure from the defendants, representing the vendor, that the terms of the contract fixed the time for its performance. It may be that the averment, simply, that complainant does not know whether the notes were executed or not, is insufficient to excuse a more specific averment of the terms of the contract, in that it does not show that complainant had done what he ought to have done to inform himself in the premises; but we are of opinion that the demurrer does not sufficiently raise that objection. The demurrer assumes that both the notes were executed and requires that the bill should describe them, or show when they became due, without exemption from that requirement by reason of any excuse whatever. As we have said, the pleader intended to aver an excuse, and if the averment is insufficient, the defect should have been pointed out by the demurrer so that it might have been obviated by amendment.

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It is also demurred that "The alleged right of complainant is stale." We do not understand it to be insisted that the supposed staleness is produced by the mere lapse of time. It appears that the bill was filed about five and one-half years after the contract of sale was entered into, and about one year and ten months after complainant offered to perform the contract. The argument which proceeds upon this assignment of demurrer is, that the complainant has so acquiesced in the assertion by the vendor and his personal representative of possession of the land, and the reception by them of the rents and profits, that a court of equity, in the discretionary exercise of its jurisdiction to enforce executory agreements, should not lend him its aid in the enforcement of the present contract. It is said that the statutory duties of the administrator in respect of the land and its rents, which it must be presumed he has performed, have imposed upon him obligations and liabilities to his trust, which he can not discharge uninjured if he is made to surrender these lands and account to complainants for the rents and profits he has received, and that complainant, having acquiesced in the exercise of his statutory powers over the land and the imposition upon himself of these obligations and liabilities, without sooner moving for the relief now sought, should be estopped from asking a performance of the contract. As in reference to the demurrer last considered, we think we are not called upon to pass upon the merit of this argument, for the reason that the demurrer does not properly raise it. The affirmation that the demand is stale does not imply mere acquiescence in special conditions and circumstances which render it inequitable to enforce the demand; but it implies rather that the suitor has slept upon his supposed rights for so great length of time that it may be justly expected that events have become forgotten, witnesses died or removed beyond the reach of parties, and other means of proof lost or destroyed. Bouvier defines stale demand as, "A claim which has been for a long time undemanded; as for example, where there has been a delay of twelve years unexplained, (2 Bouv. Law Dic. 660); and Repalje defines it, as "A demand or claim which has not been pressed or asserted for so long a time that a court of equity will refuse to enforce it."—2 Rap. Law Dic. 1214. The idea involved

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seems to be the great lapse of time, and not mere changes in conditions, apart from such lapse of time, which render the enforcement of the demand inequitable. We are of opinion, therefore, that good pleading requires, in order to support the argument now made, that the demurrer point, more definitely than in the present case, to the facts and circumstances which are insisted render the complainant's demand inequitable.

It is not essential to the maintenance of a bill for specific performance that the complainant, vendee, offer to perform, or tender a deed before filing the bill. A failure to do so affects only the question of costs.—*Stevenson v. Maxwell*, 2 Coms. (N. Y.) 408; *Bruce v. Tilson*, 25 N. Y. 194; *Morris v. Hoyt*, 11 Mich. 9; *Irvin v. Gregory*, 13 Gray 215.

It is a familiar rule, declared in many of our decisions, that the relation of a vendor of lands, who has retained the title and bound himself to convey on payment of the purchase money to his vendee, is analogous to that of mortgagee to mortgagor. All the incidents of a mortgage attach to it. We hold, therefore, that such a vendor in possession of the lands is accountable to the vendee or his assignee for rents and profits to like extent that a mortgagee in possession is accountable. X

The other grounds of demurrer are so manifestly untenable that we do not discuss them.

The decree of the chancery court is reversed, and a decree will be here rendered overruling the demurrers to the bill and remanding the cause for further proceedings. The defendants will plead to or answer the bill within thirty days, with authority in the chancery court to extend the time, if necessary.

Reversed, rendered and remanded.

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Action to Recover Damages for Personal Injuries.

1. *Commencement of a suit; suing out a summons.*—A summons is not sued out so as to be the commencement of a suit (Code, § 2831), until it passes from the hands of the clerk, properly signed by him, to

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the sheriff or other proper officer to be executed, or is sent by mail or otherwise to such officer with a *bona fide* intention to have it served.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN P. HUBBARD.

This action was brought by Louis Engel against D. P. West, a hotel proprietor; and sought to recover damages for personal injuries alleged to have been caused by the negligence of the defendant.

The injury for which the action was brought occurred on March 21, 1890; and the summons and complaint bear date March 16, 1891. The summons and complaint were delivered to the sheriff and executed by him on April 6, 1891. There was judgment for plaintiff, and defendant appeals. The only facts which have reference to the question decided by the court are sufficiently stated in the opinion, and the only question decided renders it unnecessary to set out in detail the various rulings of the lower court.

ARRINGTON & GRAHAM, for appellant.

A. A. WILEY, *contra*.

HARALSON, J.—The undisputed facts of the case, as to the date of the commencement of this suit, are, that the plaintiff received the injuries of which he complains on the 21st March, 1890, and the summons and complaint, which bear date the 16th March, 1891, were not delivered to the sheriff to be executed, until the 6th day of April following, more than a year after said injuries were received, and the cause of action therefor accrued.—Code, § 2619.

It is provided by statute in this State, in the chapter on the limitation of actions, that “The suing out of the summons is the commencement of a suit, whether it be executed or not, if the suit be continued by an *alias*, or recommenced at the next term of the court.”—Code, § 2631. The occasion for the adoption of this statute was, no doubt, that it was the practice of the King’s Bench and Common Pleas in England, and in some of the States, not to hold the suit as commenced until the writ was served and returned.—*Johnson v. Farwell*, 7 Greenl. 372. Under such a practice, the statute of lim-

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itations might be indefinitely suspended, putting it often in the hands of the parties, on the one side or the other, as interest might suggest, to determine when a suit should be considered as commenced. It is of importance that the period of the commencement of the running of the statute of limitations of actions, and the end of its running, shall be definitely fixed in the law. It is said, therefore, that, except in Connecticut and Vermont, the issuing and suing out of the writ is the commencement of the action, and in those States, the service is the commencement.—1 Amer. & Eng. Encyc. of Law, 184, and authorities under note 4.

When then may the summons be said to be sued out? There seems to be no question as to what is meant by *suing out of the summons*. There is a uniformity of decision, so far as we have observed, that the term is construed as meaning when the writ leaves the hands of the clerk, or his deputy, to be delivered in good faith to the sheriff to be executed.

In *Burdick v. Green*, 18 Johns. 14, it was held that the issuing of the writ is the commencement of the action, in all cases where time is material, so as to save the statute of limitations; and that it is not necessary to show that it was actually delivered to the sheriff, but sufficient if made out and sent to him by mail or otherwise, with a *bona fide* intention of having it served.

In *Whitaker v. Turnbull*, 18 N. J. L. (3 Harrison) 174, Chief Justice Hornblower reviewed many of the authorities and announced the conclusion, that when a writ is issued out of the office of the clerk, or of the attorney, as was usually the practice in that State (presumably as the agent or deputy of the clerk), in good faith, for the purpose of being served or proceeded on, and that purpose was not afterwards abandoned, it was, for all material purposes, the actual commencement of the suit.

Ross v. Luther, 4 Cow. 158, is a case directly in point, where it was held, that the issuing of the writ was the commencement of the action; that the mere filling it up is not sufficient; it must be either delivered to the sheriff or sent to him by mail or otherwise, with a *bona fide*, absolute, unequivocal intention to have it served; that if delivered to an agent or messenger who has power to determine, when or whether it shall be given to the sheriff, the writ is not deemed issued, nor the suit commenced,

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until its actual delivery to the sheriff. This case, reported in 15 Amer. Dec. 341, has been made the basis of an extended note by Mr. Freeman, in which he reviews the American cases on this question. He states as his conclusion, after such a review, that the doctrine laid down in *Ross v. Luther* is the general rule in the United States, except where it has been otherwise provided by statute.

Construing a statute of this State which required corporations to give security for costs before commencing suits, (Rev. Code, § 2804), PECK, C. J., speaking for the court, said: "A writ, so far as giving security for costs is concerned, is not considered as commenced until the summons and complaint are handed to the sheriff to be served. The suing out of the writ is the commencement of the action. A writ can not be said to be sued out, until it passes from the hands of the clerk to the sheriff to be executed."—*Ex parte Locke*, 46 Ala. 77, To the same effect is the case of the *Ala. & Tenn. R. R. Co. v. Harris*, 25 Ala. 335.

The date of the writ may be deemed as *prima facie* evidence of the time of its issuance, (15 Amer. Dec. 347, note); but, the date of the summons is not conclusive evidence of the time of the commencement of the suit.—*Huss v. Cent. R. R. & Bk. Co.*, 66 Ala. 475; *Ala. Gt. S. R. R. Co. v. Hawk*, 72 Ala. 117. When the real time of the issuance of the writ is material and questioned, it is one of fact for the determination of the jury.

In this State, the practice is to allow an *alias* summons and complaint, whenever an action has been commenced but not served. Without the commencement of a suit, an *alias* writ is anomalous. A summons may be signed by the clerk and dated and allowed to lie dormant in his office until the next term, or he may hand it to the attorney for the plaintiff, and he may keep it in his possession and never deliver it to the sheriff, and in neither case could the summons be said to have issued, or the suit commenced, nor would an *alias* lie upon it at the next term.

Our conclusion, therefore, from our own and other adjudged cases, is, that a summons can not be said to be sued out, under our statute, until it passes from the hands of the clerk to the sheriff, or other proper officer, to be executed, or sent by mail or otherwise, with a *bona fide* unequivocal intention to have it served.

[West v. Engel.]

The evidence of the clerk of the court, the deputy sheriff who received and executed the summons and complaint, and that of plaintiff's attorney shows without conflict, that sometime before the 22d of March, 1891, the attorney of the plaintiff sent the summons and complaint by his stenographer to the clerk of the court, with a lot of other papers, with instructions to the stenographer to request the clerk to sign his name to the original process and issue at once, that the same was signed by the clerk, and was inadvertently carried back by the stenographer to the attorney's office, where it lay undiscovered, (as the attorney deposes), until after the 22d of March, 1891, and after he discovered it, he carried it to the clerk's office and instructed him to issue it, but he did not remember on what day he carried it to the clerk, further than it was before the 6th of April, 1891; that it was the habit of the clerk, (as he himself deposed), to issue summons and complaints as soon as he could, after they were brought to him by attorneys; that he did not remember signing the process or on what day it was issued, but the signature to it was his and that it was executed on the 6th of April, 1891. The evidence of the deputy sheriff, Westcott, full, clear and uncontradicted is, that the clerk brought the summons and complaint to him on the 6th of April and not before; that he executed it the same day he received it; that he endorsed on it the day he received it, and the day he executed it—the 6th April, 1891—and signed the sheriff's name thereto, by him as deputy, and he made these entries on the sheriff's docket, which were introduced in evidence.

Under these facts, according to the principles of law we have announced, this suit was barred when it was commenced, and the court below should have given the general charge in favor of the defendant.

Reversed and remanded.

Allen, Bethune & Co. v. McCreary, et al.

Action against County Treasurer and his Sureties.

1. *County certificates not commercial paper.*—County certificates, issued for jurors' and bailiffs' services, are not negotiable commercial paper, and the purchaser thereof takes them subject to all the defenses which the county may have against the transferror.

2 *Purchase by treasurer's deputy of county certificates.*—A purchase by a county treasurer's deputy, who performs all the duties of the office, of jurors' and bailiffs' certificates when he has county funds in his hands, and which he does not account for on the expiration of his term of office, is in law a payment of such certificates of the county with the county funds which were unaccounted for, and the transferee of the deputy can not collect them from said treasurer's successor in office.

APPEAL from the Circuit Court of Conecuh.

Tried before the Hon. JOHN P. HUBBARD.

This was an action brought by Allen, Bethune & Co. against J. A. McCreary, the county treasurer of Conecuh county, and the sureties on his official bond; and sought to recover damages for the breach of said bond by reason of the treasurer, McCreary, not paying, on presentation by the plaintiffs, certain bailiffs' and jurors' certificates, which had been regularly issued to the jurors, and bailiffs, and had been transferred to Allen, Bethune & Co., by one Herrington. The material facts of the case are sufficiently stated in the opinion.

Upon the examination of one J. B. F. Watts, who was, during the time of the transactions involved in this suit, treasurer of Conecuh county, he was asked the following question by the plaintiffs' counsel: "Did not the grand jury at the Spring Term, 1886, make an examination of your books as county treasurer, and make a report thereon to the court?" The court refused to allow this question, and the plaintiffs duly excepted. The plaintiff then proposed to introduce in evidence in this connection the report of the grand jury made at the Spring Term, 1886, showing the amount of said deficit;

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but the court refused to allow this report to be introduced, and to this ruling of the court the defendant duly excepted. The defendants separately introduced as witnesses, Messrs. Irwin, Long, Matthews, and Ward, each of whom testified that at the Spring Term, 1886, their certificates as grand jurors and bailiffs, respectively, were presented by each of them to N. H. Herrington, and were paid in cash. These certificates were among the number which form the basis of the present suit.

Upon the introduction of all the evidence the court, at the request of the defendants, gave the following written charges, and to the giving of each of said charges the plaintiffs duly excepted: (1.) "If the jury believe the evidence they should find for defendants." (2.) "If the jury believe the evidence they should find for the defendants as to the Irwin, Long, Matthews and Ward claims sued on."

FARNHAM & CRUM, for appellant.

BOWLES & RABB, *contra*.

STONE, C. J.—Watts was the county treasurer of Conecuh county, having all the rights pertaining to that office. He did not personally discharge the duties of the office, but by an arrangement between him and Herrington, the latter kept the books, and received and disbursed the county's money. In fact, he, Herrington, performed all the duties of the office, during the time of the transactions which gave rise to this suit. Those transactions occurred during the spring of the year 1886.

The following are undisputed facts: In April, 1886, Herrington incurred a debt of \$2,000 to Allen, Bethune & Co., due November 1, 1886, and gave them a mortgage and crop lien to secure its payment. The mortgage conveyed, among other things, Herrington's crop to be grown that year, and ten head of mules. In the granting clause is this language: "Also county claims on Conecuh county, between \$1,000 and \$2,000 worth, to be properly transferred and forwarded to Allen, Bethune & Co., to cancel mortgage on the above 10 mules and crops; provided satisfactory security to Allen, Bethune & Co., is placed in lieu thereof in twenty days." He did transmit to them county claims on Conecuh county, being

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certificates issued to jurors and bailiffs for services rendered during the Spring Term, 1886 of the circuit court of that county; of jury certificates \$200 in amount, and of bailiff certificates \$100 in amount. These certificates were endorsed in blank by the persons to whom they were issued. Demand was made on the treasurer for the money these certificates represented, and he refused to pay them. The present suit was brought to enforce their payment; but the suit is against McCreary, the successor of Watts, and against the sureties of McCreary. The record contains this recital: "It was in evidence that at the time of presentation of claims sued on for payment to Herrington, he had enough money of the county on hand to pay them, unless he had disposed of it, and that Watts did not dispose of any of the money so as to cause a default." It was also an undisputed fact that Watts went out of office a defaulter to the extent of \$4,000, even if the county defends this suit successfully; and that such default was chargeable to Herrington, and in no sense to Watts, who had not handled the money.

There is conflict shown in the testimony on a single inquiry of fact. Herrington testified that he had purchased from the persons to whom they were issued all the jury and bailiff certificates he had turned over to Allen, Bethune & Co., paying for them sometimes in money, and sometimes in merchandise. Several of the persons to whom the certificates had been issued were examined as witnesses, and each testified that he presented his claim to Herrington for payment, and that the latter paid him the money.

This suit, although in form against McCreary and his sureties, is practically a suit against the county; for if McCreary be required to pay the claim, it will become a credit on his account as treasurer.

The certificates, which constitute the cause of action in this suit, are not what is known as commercial paper. They are simply evidence of the county's indebtedness, to be paid out of the county's funds in hands of the county treasurer.—Code of 1886, §§ 915, 762, 848, 1756, 1757, 4883. And even if they were negotiable, commercial paper, they were then due, and the money they represented presently demandable, when, as is claimed, Herrington became the owner of them. For each of

these reasons, they were open to the same defenses which could have been made if Herrington himself had been plaintiff in the action.—Code, § 1765; 3 Brick. Dig., 740, §§ 32, 33.

Another principle must not be lost sight of. Herrington, as we have shown, was practically the county treasurer, for he received, retained and paid out the county's money, precisely as Watts would have done, had he been in the active discharge of the duties of the office. So that, in legal contemplation, Allen, Bethune & Co. can assert no better claim than Herrington himself could have asserted, and Herrington had no better cause of action against the county than Watts would have had, if he himself had sued, claiming that, although he had the county's money in his hands, he did not use it in paying the claims, but purchased them for himself, paying for them partly in money, and partly in merchandise. This is the true state of the question, because it is clearly shown and not disputed that when Herrington paid, or purchased the certificates, he had the county's money with which to pay them, and that money still remains in his hands unaccounted for. The law pronounces the transaction a payment of the county's indebtedness with the county's funds, and not a purchase by treasurer, or by Herrington, his *alter ego*.

The circuit court did not err in the charges given, nor in the rejection of the evidence offered. The latter could shed no light on the merits of the controversy.

Affirmed.

Knight v. Bradley.

Action on Promissory Note.

1. *Pleadings; when special plea will be presumed to have been interposed.*—In an action on a promissory note, where no pleas appear of record, but the judgment entry recites that issue was joined, and the bill of exceptions shows that evidence of payment was introduced without objection, and payment *vel non* was really the issue to which both parties addressed themselves, it will be presumed that such issue was properly presented by special plea; and on appeal the

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plaintiff cannot be heard to say that no such issue was properly presented.

2. *Same.*—Where, on an appeal from a judgment rendered in a suit upon a promissory note, no pleas appear of record, but the judgment entry recites that issue was joined, and the bill of exceptions shows that evidence was introduced without objection which was incompetent under the general issue, but was admissible equally under two special pleas, one of which was broader in its scope, and if sustained more prejudicial to the plaintiff than the other, it will be presumed that the issue consented to be tried, though not formally presented, was the one raised by the more restricted and less prejudicial plea.

3. *Charge to the jury.*—When, in a suit upon a promissory note, there is no issue of set-off presented by the pleadings, a charge which authorizes the jury to return a verdict in excess of payment over the debt claimed by the plaintiff, as they may determine from the evidence, is erroneous, and should not be given.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOS. M. ARRINGTON.

This was an action brought by the appellant against the appellee; and counted on a promissory note for \$300, which was made by the defendant to the plaintiff.

On the trial of the cause, as is shown by the bill of exceptions, the plaintiff offered in evidence the note sued on, which showed that on May 31, 1887, the defendant promised to pay on the 1st of October, 1887, to Thos. D. Knight, or order, \$300, and in the note waived his right to exemptions as to personal property. The evidence for the plaintiff further tended to show that at the time said note was given, the defendant executed to plaintiff a mortgage to secure the same, and that the note sued on was given in payment of advances which were made previous to its execution. The testimony for the defendant was in conflict with this contention, and tended to show that the note and mortgage, which was executed contemporaneously therewith to secure its payment, were executed for advances, which were to be made by the plaintiff for the defendant for the purpose of making a crop during the year 1887; that in the fall of the year 1887 the defendant had, at various times, made payments on said note, and that these payments, in the aggregate, amounted to more than the face of the note; and further, that at the time of the execution of this note, the defendant had paid to the plaintiff all that was

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due him for advances made previous thereto. The mortgage was introduced in evidence, and recited the execution of a note bearing same date, and that it was made for the purpose of securing the prompt payment of said note, "as well as any future indebtedness," which the defendant might incur to the plaintiff.

Upon the introduction of all the evidence, the court, at the request of the defendant, gave the following written charges: (2.) "If the jury believe from the evidence that the note sued on was given to secure advances for the year 1887, not to exceed \$300, and not for any alleged previous indebtedness, then the law applies the proceeds of the cotton grown on the plantation of defendant during the year 1887 to the payment of the note, secured by a mortgage on the crops on said plantation; and if the jury believe from the evidence that the proceeds of the cotton and other payments amount to or exceed the amount of the advances made by Knight to Bradley after the execution of the said note and mortgage, the jury must find for the defendant." (3.) "If the jury believe from the evidence that all the indebtedness by Bradley to Knight was settled and paid, and there was nothing due by Bradley to Knight at the time of the execution of said mortgage and note on the 31st day of May, 1887, and that Bradley paid to Knight the proceeds of six bales of cotton, less \$15, and other amounts, in excess of what was advanced by Knight to Bradley, and in excess of what Bradley owed Knight, the jury must give Bradley a judgment over against Knight, under defendant's plea of set-off, for such excess." (4.) "The jury are the judges of the facts, and of the credibility of the witnesses who have testified in the case; and on weighing the testimony of the witnesses the jury must consider the manner of each witness on the stand, his manner of testifying, his interest in the cause, his relationship to the parties, and his connection with the case. These are circumstances which the law permits the jury to weigh, in connection with the other evidence in the case, in considering the credibility of the witnesses who have testified in this case." The plaintiff separately excepted to the giving of each of these charges.

There was verdict, and judgment rendered thereon, in favor of the defendant, assessing him damages at \$66.

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The plaintiff appeals, and assigns as error the giving of the charges requested by defendant and the judgment rendered.

ARRINGTON & GRAHAM, for appellants.

A. A. WILEY, *contra*.—After a trial by jury the judgment will not be reversed because of the want of an issue or plea appearing of record, no objection appearing to have been made in the primary court.—*Lucas v. Hitchcock*, 2 Ala. 287; *Clark's Admr. v. Stoddard*, *Miller & Co.*, 3 Ala. 366; *Bethea v. McCall*, 3 Ala. 449; *Bancroft v. Stanton*, 7 Ala. 353-4; *Dent v. Smith*, 15 Ala. 286; *McElhaney v. Gilleland*, 30 Ala. 183. It can not be objected on appeal that no issue has been tried, when the record shows that an issue was submitted to the jury, although no plea appears of record.—*Bethea v. McCall*, 3 Ala. 499; *Lucas v. Hitchcock*, 2 Ala. 288; *Castleberry v. Pearce*, 2 Stew. & Por. 141; *Wade v. Killough*, 3 Stew. & Por. 434; *Jennings v. Cummings & Mason*, 9 Porter 310; *Clark v. Stoddard*, *Miller & Co.*, 3 Ala. 366.

McCLELLAN, J.—The appellant was plaintiff below, the action being on a note executed by the defendant Bradley. No pleas appear of record, but the judgment entry recites that issue was joined. On this state of the record, if it does not appear from the bill of exceptions that other defenses than such as may be made under the general issue were mutually and without objection litigated, the presumption is that the general issue only was presented. Under our statute, payment is matter for special plea, and can not be given in evidence under the general issue. In this case, however, evidence of payment was admitted without objection and payment *vel non* was really the issue to which both parties addressed themselves—the only litigated issue indeed on the trial. Under these circumstances the further presumption will be indulged that that issue was properly presented by plea.—*Richmond & Danville R. R. Co. v. Farmer*, 97 Ala. 141, 12 So. Rep. 86; *Kansas City, Memphis & Birmingham R. R. Co. v. Burton*, 97 Ala. 240, 12 So. Rep. 88.

This doctrine proceeds on the idea that by their course on the trial the parties have consented to the litigation of the issue to which the evidence is directed and thereby

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waived the formal interposition of a plea. But the presumption will go no further than is necessary to give effect to this implied consent, or, in other words, it will not be presumed that any other plea than such as would render the course of the trial regular and proper was entered; and where the evidence adduced without objection is admissible equally under either of two special pleas, neither of which appears by the record, and one is broader in its scope and, if sustained, more prejudicial to the plaintiff than the other, it will be intended that the issue consented to be tried, though not formally presented, was the more restricted and less prejudicial, because the plaintiff may well and consistently insist that his implied consent extended only to the less hurtful of the two, since that equally with the other accommodates the evidence which he has allowed to go in by failing to object to it. This case illustrates the proposition we are endeavoring to declare. Here the evidence which was not competent under the general issue, and which was yet adduced without objection by the plaintiff, was pertinent to either of two issues which might have been regularly presented by special plea, namely, payment and set-off. Having failed to object and having thus without objection litigated an issue to which this evidence was relevant, the plaintiff can not now be heard to say that no such issue was formally made: that would be inconsistency on his part and to permit him to speculate on the result of the inquiry—to profit by it if found in his favor, and not to be bound if found against him. But he can consistently say that he consented to try the issue of payment *vel non* without that defense being specially pleaded, and at the same time that he did not consent to try the issue of set-off, or waive the formal tender of that issue. He might well be content to abide the issue of payment, while unwilling to take the chances, unless forced to do so by plea actually and seasonably filed, of a judgment over against him.

On these considerations, we hold that the plea of payment is to be taken as having been regularly filed in this case, but that it can not be presumed that set-off was pleaded at all; and there is the more reason for this conclusion in the fact that set-off is in the nature of a cross action and must in strictness be stated with the same particularity essential to a complaint in an original suit.

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There being no issue of set-off in the case, no cross action seeking a recovery over against the plaintiff, the trial court erred in giving charge 3 which authorized the jury to return a verdict for excess of payments over the debt claimed. We discover no error in giving the other instructions excepted to.

The judgment is reversed, and the cause remanded.

Creed et al. v. The Sun Fire Office of London.

Action on Fire Insurance Policy.

1. *Insurance company; agent's mis-statements do not avoid policy.*—Where an applicant for insurance makes full and true answers to the questions contained in the application, but the agent, himself writing the application, knowingly and intentionally writes down the answers different from the statements made by the insured, the insurance company can not avoid its obligation under said policy, on the ground that the interest of the insured was not truly stated in the application, as required by the policy.

2. *Creditor has insurable interest in deceased creditor's property.*—The creditor of a deceased debtor, whose estate is insufficient to pay his debts, has an insurable interest in the property of the estate, which may be subjected by a proceeding *in rem* to the payment of his debts; but the recovery can not exceed the amount of the insurable interest.

3. *Action on insurance policy; pleadings.*—In an action on an insurance policy, pleadings that allege that the building insured belonged to the estate of the deceased person, who owned no other real estate, that the said building and lot on which it was situated were subject to the homestead and dower right of the deceased's widow, who was one of the insured, that the other insured was a creditor of the deceased, and that the personal assets of his estate were insufficient to pay his debts, show an insurable interest in said building in both of the insured.

APPEAL from the Circuit Court of Montgomery.

Tried before the HON. JOHN R. TYSON.

This was an action brought by the appellants, Katie Creed and Mattie Flinn, against the appellee to recover \$2,000, the amount claimed on a policy of insurance on

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a building situated near the city of Montgomery, which was insured by the defendant against loss or injury by fire, and which was, before the bringing of said suit, entirely destroyed by fire. The defendant pleaded several pleas. By the first plea it pleaded the general issue. In the third plea it averred that by the terms of said policy it was provided that the entire policy was to be void if the insured concealed or misrepresented any material fact concerning the insurance or the subject thereof; and further averred that the insurer had concealed a material fact concerning the subject of the insurance, in that, the plaintiffs applied for, and took out said insurance upon the house described in the complaint as their property, whereas in truth, it was, at the time of the taking out of said policy, and at the time of said fire, the property of the estate of one T. W. Creed, who died intestate before the taking out of said insurance policy; and that the said T. W. Creed left surviving him brothers and sisters, heirs at law, and that neither of the plaintiffs was a sister of the deceased; and that the plaintiffs concealed from the defendant the fact that said house was the property of the estate of the said T. W. Creed, deceased. In the sixth plea the defendant set up as a defense that the fire by which the building was destroyed was caused by the fault of the plaintiffs. The second, fourth and fifth pleas are in the following language: "Second. It avers and states that in and by the terms of the policy sued on in this case it is expressly provided, among other things, that the entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void if the interest of the insured be other than the unconditional and sole ownership of the property insured, and defendant avers that the said insured took out the said policy upon the said house described in said complaint as their property, and that at the time the said insurance occurred and at the time said building was destroyed by fire the said house was not the property of the said plaintiffs; and defendant further avers that the said policy contains no agreement endorsed thereon or added thereto that the plaintiffs might insure the said property although they were not the sole and unconditional owners of the said property." "Fourth. And further answering said complaint defendant says: That in and by the terms of the policy sued on in said complaint it is

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expressly provided that the entire policy shall be void if the interest of the insured in the property be not truly stated therein; and defendant avers that the interest of the said insured is not truly stated in the said policy; that the said property is insured as the property of the said plaintiffs, whereas in truth and in fact the said property was not the property of the said plaintiffs; that the said Mattie Flinn had no interest in the said property; that the said house insured formerly belonged to one T. W. Creed, who had died intestate, leaving certain brothers and sisters as his heirs at law; that the only interest that the said plaintiff Katie Creed had in and to the said property was the interest which she, as the widow of the said T. W. Creed, might acquire therein, and the said Mattie Flinn had no interest therein; wherefore this defendant avers that the interest of the said plaintiffs, the insured, was not truly stated in the said policy, and that the same is void." "Fifth. And further answering said complaint this defendant avers, that in and by the terms of said policy it is expressly provided that, unless it is provided by agreement indorsed thereon or added thereto, the said policy shall be void if the subject of the insurance be a building on ground not owned by the insured in fee simple; and defendant avers that the subject of insurance in this instance was a building on a certain lot of land near the city of Montgomery, Alabama; that the said lot of land was not at the time of taking out said policy or at the time of said loss, nor at any time after the taking out of the said policy, owned by said plaintiffs in fee simple, but that, on the contrary, the said ground was owned by the heirs at law of one T. W. Creed, then lately deceased; and that plaintiffs were not the heirs at law of said T. W. Creed; and defendant further avers that no agreement was endorsed on the said policy or added thereto providing that the subject of insurance might be on ground not owned by the insured in fee simple; and that the defendant had no notice at the time of the issuance of said policy, nor at any time prior to the burning of said building, that the plaintiffs did not own the ground upon which the said building was situated."

The plaintiffs joined issue on the first, third and sixth pleas, and to the second, fourth and fifth pleas they filed the following replication: "That at the time of taking

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out the policy of insurance sued on in this cause, Katie Creed, one of the plaintiffs, was the widow of T. W. Creed then lately deceased, who died seized in fee of the property insured, and that she is still such widow; that as such widow she had and has an interest by way of dower and homestead in the property covered by said insurance, that she had such interest at the time of the application for and the issuance of said policy by defendant; that at the time of the application for and the issuance of said policy Mattie Flinn, the other plaintiff in this cause, was a large creditor of the estate of T. W. Creed in the amount of, to-wit, about two thousand dollars, and that she was such creditor at the time of the burning of said house insured and described in the complaint in this cause, and such claim of Mattie Flinn has been ever since the taking out of the policy of insurance sued on, and is now, a valid and subsisting demand against the estate of T. W. Creed, deceased; that there is not and was not, at the time of the application for and the issuance of the policy sued on in this cause, enough personal property belonging to the estate of T. W. Creed to pay the debts due and outstanding against said estate. And plaintiffs aver that they applied to one J. B. Trimble, who was, at the time of said application, the regularly constituted agent of defendant corporation, for said policy on said building; that said J. B. Trimble well knew at the time plaintiffs applied for said policy, and at the time of the issuance and delivery to them by him as such agent of defendant corporation, that the said property so insured was the property of the estate of T. W. Creed, deceased, and that he was, at the time of the application for said policy, informed of this fact by plaintiffs; that said Trimble, as agent of defendant, well knew, at the time of the application for said policy and its issuance, and was then and there informed by plaintiffs, that their only interests in the property so insured was, that plaintiff Mattie Flinn was a creditor as above described of the estate of T. W. Creed, and that plaintiff Katie Creed was the widow of said T. W. Creed, and as such had a dower and homestead interest in said property; that so knowing, said J. B. Trimble himself drew up the application for said insurance, received the premium therefor, and turned the policy over to plaintiffs, and that plaintiffs never in any way misrepresented the title to said property to the

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defendant or any of its agents, but that the defendant, with full knowledge as aforesaid, issued said policy to plaintiffs." This replication was afterwards amended by averring that the property insured in said policy was the only real property of the estate of said T. W. Creed, deceased. To the replication as amended the defendant demurred on the following grounds: 1st. It is averred in the second plea, and not denied by the replication, that the policy sued on contains a clause and stipulation that it should be void, unless otherwise provided by agreement endorsed thereon, if the interest of the insured should be other than the unconditional and sole ownership of the property insured, and it is shown by the allegations of said replication that the insured were not the unconditional and sole owners of such property, and it is not averred therein that there is any agreement endorsed on said policy that plaintiffs might insure such property although they were not such owners. 2d. It is averred in the fourth plea, and not denied by said replication, that one of the terms of the policy sued on is that the same should be void if the interest of the insured in the property be not truly stated in the policy, and it is not shown by said replication that such interest was truly stated. 3d. It is shown by said replication that the interest of the insured was not truly stated in the policy. 4th. It is not denied that the policy sued on provides that it should be void if the buildings insured were not situated on ground owned by the insured in fee simple, and it is shown by the allegations of said replication they were not such owners. 5th. It is shown by the allegations of said replication that plaintiffs had no insurable interest in the property covered by the policy sued on. 6th. It is shown by the allegations of said replication that plaintiff Flinn had no insurable interest in the property covered by the policy sued on. 7th. It is shown by the allegations of said replication that the contract sued upon was and is a wagering or gambling contract. 8th. It is shown by the allegations of said replication that plaintiff Flinn had no interest in the property covered by the policy sued on, and that the alleged contract insuring the same was and is against public policy and void. 9th. It is not shown by the allegations of said replication that plaintiff Creed had any homestead right in the property covered by the policy sued on. 10th.

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It is shown by the allegations that the property was not subject to the debt of Mattie Flinn."

The court sustained these demurrers, and the plaintiffs declining to plead further; the court rendered judgment for the defendant. The plaintiffs prosecute the present appeal and assign as error the sustaining of the demurrers to their replication and the rendering of judgment for defendant.

A. A. WILEY, for appellants.—An insurance company cannot be permitted to take advantage of the mis-statements of its own agent, and avoid the policy, when the insured was without fault.—*Williamson v. New Orleans Ins. Asso.*, 84 Ala. 108, 4 So. Rep. 36; *Ala. Gold Life Ins. Co. v. Garner*, 77 Ala. 210; *Herndon v. Triple Alliance*, 45 Mo. App. 426; *Follette v. United States Mut. Acc. Ass'n.* (N. C.) 14 S. E. Rep. 923; *Gristock v. Royal Ins. Co.* (Mich.) 49 N. W. Rep. 634. The term "interest," as used in a policy of insurance, does not necessarily imply property. The person may have an insurable interest without an absolute legal or equitable title in the property.—*Putnam v. Mercantile Ins. Co.*, 5 Metc. 386; *Lazarus v. Commonwealth Ins. Co.*, 19 Pick. 81, 98; *Han- cor v. Fishing Ins. Co.*, 3 Sumner's C. C. 132; *Fenn v. New Orleans Mut. Ins. Co.*, 53 Ga. 579. *Depaba v. Ludlow*, Comyn's Rep. 360; *Schweiger v. Magee*, Cook & Al. 182; *Keith v. Protection Marine Ins. Co. of Paris*, Ir. L. D. 10 Ex. 51. It can not be denied that Mrs. Creed, as the widow of the deceased, being entitled to dower and a homestead right in the property insured, had an insurable interest therein.—*Harris v. York Mut. Ins. Co.*, 50 Penn. 341; *Lucena v. Crawford*, 5 Bos. & Pul. 269; *Buck v. Chesapeake Ins. Co.*, 1 Peters (U. S.) 151; *DeForrest v. Fulton Fire Ins. Co.*, 1 Hall Sup. C. Rep. 84; *Waring v. Ind. Fire Ins. Co.*, 45 N. Y. 606.

Under the facts of the case Mattie Flinn, as a creditor of the deceased, had an insurable interest in the property insured. It has been repeatedly held that "a general creditor of the estate of a deceased, whose personal property left is insufficient for the payment of his debts, has an insurable interest in the sole real estate of the deceased debtor, when it is plain that if it is damaged by fire a pecuniary loss must ensue to the creditor thereby.— See New Digest of Insurance Decisions, Fire & Marine

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(by Hine & Nichols) under the title "Insurable Interest," page 263, citing 1 Arnold on Marine Ins. 229; Bun on Life Ins. 16; Hughes on Ins. 30; 1 Marshall on Ins. 115; 1 Phillips on Ins. 2107; Sherman on Ins. 93; Parsons on Merc. Law, 507; Parsons on Cont., 438; *Buck v. Chesapeake Ins. Co.*, 1 Peters 151; *Mapes v. Coffin*, 5 Paige 296; *Mickles v. Rochester City Bank*, 11 Paige 116; *Herkimer v. Rice*, 27 N. Y. 163; *Savage v. Howard Ins. Co.*, 52 N. Y. 502; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Waring v. Loder*, 53 N. Y. 581 *Hancock v. Ins. Co.*, 3 Sumner 132-140; Angel on Ins. Co., § 56; *Rohrbach v. Germania Fire Ins. Co.*, N. Y. C. A. 62 N. Y. 47; 4 Ins. Law Journal 737.

No counsel entered as appearing for appellee.

COLEMAN, J.—This is an action by appellants upon a policy of insurance issued for the benefit of plaintiffs, insuring a certain dwelling against loss or destruction by fire. The suit is in the joint name of Katie Creed and Mattie Flinn, the assured. The defendant pleaded several special pleas, upon some of which issue was joined, and to the others a replication was filed by plaintiffs. The court sustained a demurrer to the replication, and the plaintiffs declining to plead further, judgment was rendered for the defendant.

Several questions have been argued, but the rulings of the court upon the demurrers to the replication present the material questions involved on this appeal. The first is, whether, when a policy of fire insurance contains a stipulation that the policy shall be void if the interest of the insured be other than "the unconditional and sole ownership of the property insured," and the plea avers a state of facts which, if true, shows that the interest of the insured was not truly stated in the policy, and that the interest of the insured was not that of "unconditional and sole ownership," a replication to such plea is good, which avers that the policy was procured from an agent of the defendant, authorized to issue policies of fire insurance, to whom the insured, at the time the policy was applied for and received, truly and fully stated their interest in the property to the agent, and that the agent, being fully informed, himself drew up the application for the insurance, received the

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premium therefor, and with full knowledge of the facts, turned the policy over to plaintiffs. We have held that if the applicant make full and true answers to the questions contained in the application, and suppresses no material fact, which it is his duty to make known, the company will not be permitted to take advantage of the carelessness, inadvertence or misunderstanding of its agent, the insured being without fault.—*Ala. Gold Life Ins. Co. v. Garner*, 77 Ala. 210; *Williamson v. New Orleans Ins. Asso.*, 84 Ala. 106, 4 So. Rep. 36; *Pelican Ins. Co. v. Smith*, 92 Ala. 428, 9 So. Rep. 327; *Equitable Fire Ins. Co. v. Alexander*, (Miss.) 12 So. Rep. 25. Upon the same principle and for stronger reasons, the company cannot avoid its obligation if its own agent knowingly and intentionally writes down the answers differently from those made by the insured. We think the replication a full answer to the plea on this question.

The next proposition involves a question new in this State. Has a creditor an insurable interest in a building, the property of the estate of his deceased debtor, which may be subjected to his debt, the personal property being insufficient to pay the debts of the estate? After much deliberation our conclusion is that he has an interest which may be insured. We concede and affirm that a simple contract creditor, without a lien, either statutory or contract, without a *jus in re* or *jus ad rem*, owning a mere personal claim against his debtor, has not an interest in the property of his debtor. Such contracts are void as being against public policy. We do not think the principle applies after the death of the debtor, as to property liable for the debt and which, if destroyed, will result in the loss of the debt. The real estate as well as the personal property of a deceased debtor is liable for his debts, but the real estate can not be subjected to the payment of his debts until after the personalty has been exhausted. After the death of the debtor the debt is no longer enforceable *in personam*. The proceedings to reach the property of the estate of the deceased debtor are *in rem*. The property of the debtor takes the place of the debtor, and becomes, as it were, the debtor. Whoever knowingly receives the property of a deceased debtor and wrongfully converts it, is answerable to the creditor.—3 Brick. Dig., 464, § 143; *Id.*, 465, § 162.

The relation of creditor and debtor invests the creditor

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with an insurable interest in the life of his debtor to the extent of his debt.—*Alexander v. Sanders*, 93 Ala. 345, 9 So. Rep. 388; 11 Amer. & Eng. Encyc of Law, p. 319. It would seem upon like principles that when the property becomes directly subject to proceedings *in rem* for the satisfaction of the debt, the creditor should become invested with an insurable interest in the property. Certainly if a creditor can not obtain satisfaction of his debt from the personal property of his deceased debtor, and has a legal right, which can not be defeated, to enforce its collection by proceedings *in rem* against a building belonging to the estate of the deceased debtor, and if it be true that the destruction of the building by fire would immediately and necessarily result in pecuniary loss, the loss being the direct consequence of the fire, the creditor has an interest in the protection of the building. He has no lien as in the case of a mortgagee, nor such lien as the statute may confer on an attaching or execution creditor, but his right to subject the specific property to his debt, invests him with an interest but little less, if any, than that of the attaching or execution creditor or mortgagee. In the case of *Herkimer v. Rice*, 27 N. Y. 163, the question arose as to whether an administrator of an insolvent estate held an insurable interest in the real estate of the deceased debtor. The court (Denio, C. J., rendering the opinion) held that he did, and the conclusion was based in great part upon the proposition, that the creditors had such an interest, which the administrator could protect by insurance for them. We think whatever could be done by an administrator for the creditor in this respect, could be done directly by the creditor for himself.—*Rohrbach v. The German Fire Ins. Co.*, 62 N. Y. 47. Other reasons might be given, but we are of the opinion these are sufficient to show that the creditor of a deceased debtor, whose estate is insufficient to pay the debts, has an insurable interest in the property of the estate, which by law may be subjected by proceedings *in rem* to the payment of the debts. The recovery can not exceed the amount of the insurable interest.

The next question is, whether the pleadings show such an insurable interest. The pleas and the replication appear to have been drawn with technical caution, so far as the rights of Mattie Flinn, the creditor, are

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affected. The plea shows that the building and lot, upon which it is located, belonged to the estate of Thos. Creed, deceased, and that neither of the assured are his legal heirs. Upon the death of Thos. Creed the land descended to his legal heirs. *Prima facie*, upon the facts of the plea, the insured owned no insurable interest. The replication avers that Katie Creed was the widow of Thos. Creed, and that he owned no other real estate, and this statement of facts is followed with the conclusion, that she owned a dower and homestead interest. Hers was clearly an insurable interest. Its value is a fact to be ascertained by proof. The replication then further averred that Mattie Flinn was a creditor of Thos. Creed, stating the amount of her claim, the insufficiency of personal assets to pay the debts, and that there was no other real property belonging to his estate. The interest shown by the plea to be in Katie Creed (dower and homestead) does not include the entire estate. Under the replication there is a remainder interest in the real estate, liable for the debts of the estate. The pleadings inform us that the lot and building were in the city of Montgomery. Whether it exceeded in value two thousand dollars, the constitutional limit of the value of the homestead exempt from debts during the life time of the widow, does not appear. We are not unmindful of the statutory provision by which under some circumstances the fee to the homestead may become vested in the widow and minor children or widow or minor child. The consideration of these questions does not rise upon the pleadings. The court erred in sustaining the demurrer to the replication. The proportionate interest of the insured is a matter of adjustment between themselves if both are entitled to recover.

Reversed and remanded.

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Application for Mandamus.

1. *Unconstitutionality of act extending operation of former act.*—The act approved February 9, 1893, entitled "An act to declare inopera-

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tive an act entitled 'An act to change the boundary line between the counties of Talladega and Clay in this State,' approved January 10, 1877, and to provide for the location of the line between said counties," is violative of so much of section 2, Article IV of the Constitution as provides that no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only.

APPEAL from the City Court of Talladega.
Heard before the Hon. JOHN W. BISHOP.

The proceedings in this case were had upon a petition for *mandamus* addressed to the judge of the city court of Talladega county; and prayed that a peremptory writ of *mandamus* be issued to Hon. G. K. Miller, judge of probate of Talladega county, Alabama, to compel him to receive and file as an office paper, and to transmit to the Auditor of the State of Alabama, together with his certificate, that he believes the statements therein were entitled to credit, if he does so believe, the petitioner's application for the benefits conferred under the act of the General Assembly, entitled, "An act for the relief of needy Confederate soldiers and sailors, residents of Alabama, who, from wounds or other cause, are now unable to earn a livelihood, and for the widows of such as were killed or died in said war, and have not since re-married," and approved February 13, 1891. (Acts 1890-91, p. 624.) The allegations of the petition set forth that petitioner, Ann Berry, was the wife of one John Berry, who was a soldier in the service of the Confederacy, and who died during the war, while in such service, from disease contracted in said service; that she had never re-married; that she was a resident citizen of Talladega county, Alabama; that her taxable property does not exceed \$400 in value, and she is now physically unable to make a livelihood by labor, and that she holds no office, and that her gross income does not exceed \$400 *per annum*. It was further made to appear in said petition that she had filed her application with G. K. Miller, as judge of probate of Talladega county, which was duly sworn to before him, by which she asked for the benefit of the act of the General Assembly, approved February 13, 1891, the title of which is copied above; that said G. K. Miller, as judge of probate of Talladega county had refused to file her said application as an office paper, and to transmit a copy of the same to the Auditor of the

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State of Alabama with the statement that he believed the said certificate entitled to credit; that this refusal was solely upon the grounds that the said petitioner did not reside in Talladega county, but that, under the provisions of the act of the General Assembly of Alabama, entitled "An act to declare inoperative an act entitled 'an act to change the boundary lines between the counties of Talladega and Clay in this State,' approved January 10, 1877, and to provide for the location of the lines between said counties," approved February 9, 1893 (Acts 1892-93, p. 343), the petitioner was a resident of Clay county. It was also alleged in said petition, that the petitioner resided in section 4, township 20, range 6 East, in the Coosa Land District. In answer to the rule *nisi*, which was issued upon the filing of the petition, the respondent admitted that the petitioner was, in all respects, entitled to the benefits of the act for the relief of the Confederate soldiers and sailors, residents of Alabama, &c., (Acts 1890-91, p. 624), but it was denied that she was a resident of Talladega county, it being set up in said answer, that she had become a resident of Clay county under the provisions of the act of February 9, 1893 (Acts 1892-93, p. 343).

The cause was heard upon the pleadings, and upon an agreed statement of facts, in which the facts alleged in the petition were agreed to be substantially true in all respects, except that the petitioner was a resident of Talladega county; but it was admitted that the section on which the petitioner dwelt in the Coosa Land District was in Talladega county, unless said section was merged into Clay county under the act of the General Assembly of Alabama, approved February 9, 1893, above referred to.

The court, in its judgment, decreed that the act of the General Assembly approved February 9, 1893, was unconstitutional, as violative of section 2, article IV of the Constitution, and ordered that the peremptory writ of *mandamus* be issued to G. K. Miller, judge of probate of Talladega county, in accordance with the prayer of the petitioner. This judgment is appealed from, and the same is assigned as error.

G. K. MILLER, for appellant.

C. C. WHITSON and KNOX & BOWIE, *contra*, cited

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Rogers v. Torbut, 58 Ala. 523; *Stewart v. County Commissioners*, 82 Ala. 209, 2 So. Rep. 270; *Judson v. City of Bessemer*, 87 Ala. 240, 6 So. Rep. 267; *Bay Shell Road Co. v. O'Donnell*, 87 Ala. 378, 6 So. Rep. 119; *Maxwell v. State*, 89 Ala. 150, 7 So. Rep. 824.

HEAD, J.—The act entitled “An act to declare inoperative an act entitled ‘an act to change the boundary lines between the counties of Talladega and Clay in this State,’ approved January 10, 1877, and to provide for the location of the lines between said counties,” approved February 9, 1893 (Pamp. Acts 1892–93, p. 343) is violative of so much of section 2 of Art. IV of the Constitution as provides that no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length.—*Rogers v. Torbut*, 58 Ala. 523; *Stewart v. Commissioners*, 82 Ala. 209, 2 So. Rep. 270; *Judson v. City of Bessemer*, 87 Ala. 240, 6 So. Rep. 267; *Bay Shell Road v. O'Donnell*, 87 Ala. 378, 6 So. Rep. 119; *Stewart v. State*, 100 Ala. 1, 13 So. Rep. 943. The act is of such character that no part of it can stand and be administered without the rest.

There was no error, therefore, in the ruling of the circuit court, and its judgment is affirmed.

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Action to recover Statutory Penalty for Cutting Trees.

1. *Action to recover statutory penalty for cutting trees; misleading charge.*—In an action to recover the statutory penalty for knowingly and willfully cutting and removing trees from the lands of another without his consent (Code, § 3296), an instruction that defendant is liable for what the trees were worth, though he did not know, at the time the trees were cut, that they were on plaintiff's lands, is properly refused, it being confusing and calculated to mislead the jury, in that the jury might understand therefrom that the defendant was liable in no event for anything more than the value of the wood cut from the land.

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2. *Refusal to grant new trial; when reversed on appeal.*—This court will not reverse an order refusing a new trial on the ground that the evidence was not sufficient to support the verdict, or that the verdict was contrary to the evidence, unless, after allowing all reasonable presumption of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that said verdict was wrong and unjust.

APPEAL from the Circuit Court of Marshall.

Tried before the Hon. JOHN B. TALLY.

This was an action brought by the appellees against the appellant, to recover the statutory penalty for cutting, destroying and removing certain trees, particularly described in the complaint, as provided by section 3296 of the Code of 1886.

The complaint contained two counts. The first count claimed damages for the defendant willfully and knowingly, and without the consent of the plaintiff, cutting down a certain number and kind of trees on the property, which were specifically described in the complaint. The second count claimed damages for the defendant willfully and knowingly, and without the consent of the plaintiff, taking away a certain number and kind of trees from the same premises, which had already been cut or had fallen down. The other facts are sufficiently stated in the opinion.

There was judgment for the plaintiffs. The defendant appeals, and assigns as error the refusal of the court to give the charge requested by him, and the overruling by the court of his motion for a new trial, the ground of which motion was, that the verdict was contrary to the evidence and was contrary to law.

O. D. STREET and A. A. WILEY, for appellant.

LUSK & BELL, *contra*.

HARALSON, J.—This action was to recover the penalty prescribed by section 3296 of the Code. There were two counts in the complaint, the second of which charges the defendant with having willfully and knowingly, and without the consent of the plaintiffs, taken and carried away certain trees, which were already cut down or fallen on the lands of the plaintiffs.

The defendant pleaded not guilty, and a special plea, numbered two. The plaintiff took issue on the plea of not guilty, and replied to the second, on which replication the defendant took issue. But this second plea, and the replication to it, and joinder thereon, may be eliminated from the cause, since the course the trial took in the court below, and the argument of counsel here, show that the trial was had on the plea of the general issue.

The fact is not disputed, that defendant cut and removed trees from the lands *claimed* by, and to be in possession of the plaintiffs; but, the real contest was, whether in fact they were cut on, and removed from, plaintiffs' lands, and, if so, if the act was knowingly and willfully done by the defendant, since there was a dispute between them as to where the true line between their adjoining lands ran. There was evidence tending to support each side of the contention. We refer to so much of it, only, as will show the character of this dispute, and that, for the purposes of the appeal, on the refusal of the motion by the defendant for a new trial in the court below.

John West, the husband of one of the plaintiffs, testified that the defendant had some trees cut on the undivided lands of his wife, one of the plaintiffs, and her ward, Frank Johnson, for whose use she also sues, and of which his wife was in the possession for herself and ward; that there were 43 chestnut, 32 oak and 15 hickory trees and saplings cut on said lands; that before defendant cut them, witness went to him and requested him not to do so; that a year or two before this time, the defendant turned some hands on the land to cut timbers, and would not desist when requested; that witness went to see defendant, after he had cut the timbers, to have the line between him and his wife's lands surveyed; and after that line had been located by the surveyor, defendant came to witness and offered him 35 cents per cord for the wood he had cut, and witness asked him 40 cents, which he declined to pay, and afterwards defendant hauled the wood away.

The defendant testified, there had been three surveys of this line, one by surveyor Rickets, in 1867 or 1868, a second by Baker, and the last one by Kidd; that before the last survey, about 18½ cords of wood were cut on the plaintiffs' lands, but none of it on said lands, according

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to previous surveys; that he was careful to point out the line to his hands, and told them not to cut on plaintiffs' lands; that after they had been cutting for some time, said West came and said he desired the line run, as he did not know where it was; that to this defendant agreed and Kidd was sent for to locate the line, and did so in a manner, which defendant insists was incorrect, but the surveyor refused, afterwards, to give a certificate of its correctness; that after this line was run, he did not cut any more wood on plaintiffs' side of it, and for the sake of peace, he offered to pay West 35 cents a cord for the wood he had already cut, although he believed the survey to be wrong, and the trees had been cut on his own land; that he afterwards removed the wood from the trees he had cut down before the location of the line last surveyed.

The bill of exceptions states, that after the oral charge of the court, the defendant requested the following charge, which the court refused to give, and he excepted: "The removal and appropriation of the trees by the defendant make him liable to pay for them what they were worth, though he was not aware, at the time, that they were cut on the plaintiffs' land, and this may be recovered, if the defendant has no avoidable defense in some appropriate form of action." This was the only exception reserved, except on the order overruling the motion for a new trial.

The charge was properly refused, since it was confusing and calculated to mislead the jury, and if construed as an instruction—as it was possibly intended—that the defendant was liable, in no court, for anything more than the value of the wood cut from plaintiffs' lands, it was an incorrect proposition of law, as applicable to a case of this kind, for the recovery of the statutory penalty for knowingly and willfully cutting and removing trees from the lands of another without his consent.—*Russell v. Irby*, 13 Ala. 131; *Givens v. Kendrick*, 15 Ala. 650; *Rogers v. Brooks*, 99 Ala. 31, 11 So. Rep. 753; *Oswalt v. Smith*, 97 Ala. 627, 12 So. Rep. 109.

The questions as to where the true line between the plaintiffs and the defendant ran, and whether defendant knowingly and willfully trespassed on plaintiffs' land were, no doubt, submitted to the jury by the trial court, under proper instructions, and it was their pro-

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vince to settle them. This court, as we have before now held, will not reverse an order refusing a new trial on the ground that the evidence is not sufficient to support the verdict, or that the verdict is contrary to the evidence, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against it is so decided as to clearly convince the court that it is wrong and unjust. We are unable to draw such a conclusion as to the verdict in this case.—*Cobb v. Malone*, 92 Ala. 631; 9 So. Rep. 738; *Nooe v. Garner*, 70 Ala. 443.

Affirmed.

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Motion to Vacate and Annul a Judgment.

1. *Notice of motion to vacate a judgment; when sufficient.*—Where a motion to set aside and annul a judgment against a defendant is spread upon the motion docket of the court wherein the judgment was recovered, is properly signed by counsel for movant, and addressed to the attorneys of record for the plaintiff, and when the motion is called for trial the said attorneys for plaintiff appear for the purpose of resisting action thereon at that time, on the ground that no written notice of the motion had been served upon them or their client, no further notice to the plaintiff or his attorneys is necessary; the appearance of the latter, even for the purpose of resisting action on said motion, showing sufficient notice of the pendency thereof.

2. *Judgment by default against non-resident; when properly set aside.*—When, in an action against a non-resident, there has been no personal service of notice of the suit made upon him, no appearance entered for him, no property of his held under an attachment levy, and no indebtedness to him, no property, or effects of his ascertained and fixed in the hands of a garnishee, the court never acquired jurisdiction of the person and property of such defendant, so as to authorize a judgment by default against him; and upon proper motion, seasonably made, the court must set aside and vacate such judgment.

APPEAL from the City Court of Montgomery.

TRIED before the Hon. THOMAS M. ARRINGTON.

This is an appeal from the judgment of the city court
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granting a motion to set aside and vacate the judgment of said court, which was rendered against the movant at a former term.

The facts of the case are sufficiently stated in the opinion.

RICHARDSON & REESE, for appellants.

ARRINGTON & GRAHAM, *contra*.

STONE, C. J.—This was a motion to vacate and annul a judgment for money, rendered at a previous term in favor of Thomas W. Jennings against Henry Pearce. Jennings had assigned the claim to his counsel, who had brought the suit and recovered the judgment. The judgment was recovered in February, 1892, and the motion to set it aside was entered on the motion docket of the city court in September, 1892. The motion was signed by counsel for the movant, stating they appeared for the purpose of making the motion. It was addressed on the docket to R—& R—, att'ys for Thomas W. Jennings. This is the firm name of the attorneys who had brought the suit and recovered the judgment, and to whom the claim had been assigned. The motion was called for trial in February, 1893. R—& R—appeared for the purpose of resisting action on the motion at that time, on the ground that no written notice of the motion had been served on them, or on Jennings, their client. They stated no other reason why the motion should not be heard at that time. The court overruled the objection, and they excepted.

The purpose of notice is to give information of intended action, and to inform the opposing party, so he will not be taken by surprise. And notice to counsel of record is equivalent to notice to the party himself.—Code of 1886, § 2736; 3 Brick. Dig., 712, § 37. When there is an appearance, either by a party or his counsel, this is evidence that such party had knowledge of the action proposed to be taken. When present, and having attention directed to the subject, if not prepared for trial, a motion for delay in order to make preparation would be proper, and would doubtless be entertained. No motion of the kind was made in this case. It would seem there could not have been a want of preparation when the pres-

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ent motion was tried. Its merits and fate depended, not on oral testimony, but on records and papers pertaining to the cause, which were of file in the court. These records and papers were accessible to either party, and were in fact used to their utmost capacity on the trial of the motion. This is shown by the bill of exceptions reserved by appellant, and made a part of the record before us. The motion was tried on its merits, every inch of ground being contested, and reserved for revision in this court. The city court did not err in holding that further notice of the motion was not necessary.

The suit in this case was commenced by original attachment in favor of Jennings against Henry Pearce, sworn to be a non-resident of Alabama. No personal service was ever made on him, and no plea was ever interposed for him, or appearance entered, save the special appearance in September, 1892, entered for the purpose of setting aside and vacating the judgment by default which had been rendered in February preceding. The attachment proceedings were and are regular in form, conforming to our statute. This attachment was levied on personal property; but a doubt arising whether the property belonged to Henry Pearce, the defendant, the sheriff demanded an indemnifying bond. The bond not being given he discharged the levy. So, this levy, as a factor in the present controversy, is eliminated. There remains no constructive service by levy on property.

Chandler was summoned as a garnishee and answered. He denied all indebtedness to Henry Pearce, the defendant, but admitted said Henry Pearce had placed in his possession certain personal property, which he still held; but claimed a lien upon it for its support and preservation. He also set forth that he had received notice that said property was claimed by one Hollis Pearce to be his own proper goods. Thereupon, on the motion of plaintiff, Jennings, notice was issued and served on Hollis Pearce under the statute; and being brought in, an issue was made up "to contest with plaintiff the right to such * effects."—Code of 1886, § 2984, *et seq.* That issue had not been tried or determined, but was still pending when this motion was made and passed on. Another garnishee had been summoned, but he had neither answered, nor had judgment been rendered against him for want of an answer.—Code, § 2980.

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It is thus shown that when the judgment was rendered against Henry Peace, February, 1892, and even when this motion was tried, February, 1893, no personal service of notice of the suit had been made upon him, no appearance had been entered for him, no property of his was under attachment levy, and neither indebtedness to him, nor property, nor effects of his had been ascertained and fixed in the hands of a garnishee. When garnishment is the only means relied on as effecting constructive notice of the suit to a defendant in attachment, and as bringing him within the power and jurisdiction of the court, it is indispensable that indebtedness of the garnishee to such defendant in attachment be ascertained, or that there be traced to the garnishee's possession property or effects which belong to the defendant in attachment. Neither of these methods of giving notice having been carried into successful effect, the city court never acquired jurisdiction of the person or property of Henry Pearce, so as to authorize a judgment to be rendered against him. The city court did not err in setting aside and vacating the judgment against him.—*Lamar v. Comrs. Ct.*, 21 Ala. 772; *Lamar v. Gunter*, 39 Ala. 324; *Lewis v. Allred*, 57 Ala. 628; 2 Freeman on Judgments, § 495; *Stubbs v. Leavitt*, 30 Ala. 352; 12 Amer. & Eng. Encyc. of Law, p. 126 and notes on p. 128; *Pettus v. McClannahan*, 52 Ala. 55; 5 Amer. & Eng. Encyc. of Law, pp. 146-7, and note.

The result of this decision is, to leave the case of Jennings v. Henry Pearce still open and undisposed of on the docket of the city court, to await the result of the garnishments.

Affirmed.

Yerby, Treasurer &c. v. Cochrane.

Action against County Treasurer on Witness Certificates.

1. *Title and subject matter of statutes under constitutional provisions.*—The act approved February 21, 1893, entitled "An act to provide for and regulate the pay of State witnesses in Tuscaloosa county," (Acts 1892-93, pp. 934-936), is violative of the constitutional provision that "each law shall contain but one subject which shall be clearly ex-

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pressed in its title," (Const. Art. IV, § 2), because the said act not only undertakes to provide for and regulate the payment of State witnesses, but also the payment of officers' costs accruing in behalf of the State, which latter provision was to a subject matter not expressed in the caption of the act.

2. *Same; when whole act declared void.*—Since the provisions of said act in relation to the payment of officers' costs (the subject not expressed in the title) can not be separated from the provisions in reference to the payment of State witnesses, so that the former may be stricken from the act and leave the statute complete within itself, capable of being executed, and wholly independent of those provisions which are rejected, the whole act is void.

3. *Same.*—When a statute contains two subject matters, only one of which is clearly expressed in the title, and the provisions in reference to these separate subjects are not separable, so that the provisions in reference to the subject which is not expressed in the title can not be stricken out and leave the act to operate according to its terms and the clear intent of the legislature, the whole of the act is unconstitutional and void.

APPEAL from the Circuit Court of Tuscaloosa.

Tried before the Hon. S. H. SPROTT.

This was an action brought by the appellee, W. G. Cochrane, against the appellant, J. S. Yerby, as treasurer of the county of Tuscaloosa; and sought to recover of said treasurer the amount due on certain State witnesses' tickets that had been issued by the clerk of the county court of Tuscaloosa county. The plaintiff based his right to recover on an act of the General Assembly, entitled "An act to provide for and regulate the pay of State witnesses in Tuscaloosa county;" and alleged in his complaint that said State witnesses' tickets had been regularly endorsed to him, and he was the owner thereof. The defendant demurred to the complaint on the ground that the said act of the General Assembly, on which the plaintiff's demand was based, and on which the complaint counted, was unconstitutional and void, as violative of section 2, Article IV of the constitution of Alabama; that the subject of the act was not clearly expressed in the title; and that the said act contains more than one subject. This demurrer was overruled, and the defendant pleaded two special pleas. Plaintiff's demurrer to these pleas being sustained, the defendant declined to plead further, and there was judgment rendered for the plaintiff, upon a verdict being returned by the jury. All the other facts are sufficiently stated in the opinion.

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The opinion renders it unnecessary to set out the pleas or the demurrer thereto.

FOSTER & OLIVER, for appellant.

WILLIAM G. COCHRANE, *contra*.

MCCLELLAN, J.—Act No. 418 passed at the session of 1892–93 of the General Assembly—Acts 1892–93, pp. 934–936—is entitled “An act to provide for and regulate the pay of State witnesses in Tuscaloosa county.” The subject of the enactment thus expressed in its caption is provided for in the body of the act, but in addition to provisions cognate, germane and properly referable to a scheme for the payment of State witnesses in said county there are incorporated in the text of the act provisions and regulations for the payment of the fees of the circuit court clerk and the sheriff of that county earned in criminal cases, of which obviously there is no intimation, much less an expression, in the caption. Thus: Section 1 of the act provides, “that one-half of all the fines and forfeitures collected in the circuit or county courts, or any other courts of Tuscaloosa county, and all the proceeds of the hire of all county convicts of Tuscaloosa county, is hereby set apart and appropriated to the payment of witnesses for the State in all criminal prosecutions in said courts. *Clerk of the circuit court and sheriff*, who shall be summoned and required to appear in criminal prosecutions after the approval of this act. The remaining one-half of the fine and forfeiture fund shall be held to pay present outstanding claims against said fund, as now provided by law;” and by section 8 it is provided: “That when any convict is sentenced to hard labor for the county to pay the fine and costs, the hirer of such convict shall pay to the proper officer the costs due the State’s witnesses, *and officers of the court*, which accrued in such conviction in behalf of the State, in advance, and such sum shall be placed to the credit of the fine and forfeiture fund, and shall be disbursed by the treasurer, or person acting as such according to the provisions of this act.” The italicization in these excerpts is ours. The purpose of the legislature to provide in this act for and regulate the payment of the costs due the clerk and sheriff is further accentuated by the require-

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ment of section 7, that all fines and forfeitures should "be collected in lawful money of the United States, and none other," and that such money should be paid into the county treasury to the credit of the fine and forfeiture fund, so that the claims of officers could not be utilized by them in the payment of fines and forfeitures as they might have been under the law theretofore existing; and also by reference to the provision of the first section quoted above, to the effect that the remaining one-half of the fine and forfeiture fund shall be held to pay *present outstanding* claims against said fund as provided by existing law; the conclusion being inevitable that the officers could receive nothing except under this act, and it being equally manifest the legislature intended they should in some way receive payment of their claims. It is, therefore, clear that the body of this act contains and undertakes to provide for and regulate not only the subject matter expressed in its caption—the payment of "State witnesses in Tuscaloosa county"—but also subject matter—the payment of officers' costs accruing in behalf of the State—which is not expressed or even hinted of in the caption, and which is wholly separate and distinct from the subject expressed therein. It can not be doubted that the text of the enactment is violative of the inhibition of section 2, Art. IV of the constitution, that "Each law shall contain but one subject, which shall be clearly expressed in its title," &c.; nor, at least, in so far as the subject not expressed in the caption is attempted to be provided for, that the act is void.—*Ex parte Cowert*, 92 Ala. 94, 9 So. Rep. 225; *Montgomery v. State*, 88 Ala. 141, 7 So. Rep. 51; *Ballentyne v. Wickersham*, 75 Ala. 533; *Stein v. Leeper*, 78 Ala. 517; *Ex parte Reynolds*, 87 Ala. 138, 6 So. Rep. 335.

Whether the whole enactment is void depends upon a further inquiry, namely: Can the provisions in relation to the payment of officers' costs be separated from those in reference to the payment of State witnesses so that the former may be stricken from the act and leave an enactment "complete within itself, sensible, capable of being executed, and wholly independent of that which is rejected?" We do not think the provisions in question can be so separated. They are so interlaced, so dependent upon each other, that we feel great violence would be done to the legislative intent, indeed to the

letter in which that intent is expressed, by the emasculation of the provisions of the act so far as they relate to officers and the enforcement of those provisions in respect of witnesses. In reality the provisions of chief importance in the enactment, with respect to these subjects, severally, are not in form or substance severable provisions at all. For instance, section 1 sets apart and appropriates one-half of the fine and forfeiture fund, not to witnesses alone nor to officers alone, but jointly to both classes. The act provides that witnesses shall receive a part and a part only of this moiety, and that court officers shall receive a part of it. To strike out the provision so far as it conferred a benefit on officers would be not to eliminate a provision made separately for them, but to strike out in part the provision having reference to State witnesses, and to give them the whole of a fund which the legislature never intended and has not provided that they should have, except in common with the clerk and sheriff. The one set of beneficiaries can not be deprived of the provisions attempted to be made for them without at the same time radically changing the provisions attempted and intended to be made for the other. If the act should stand at all so far as it relates to witnesses, it would stand not as it was enacted but as it is changed even in respect of such witnesses by the judicial elimination from it of provisions which not only had relation to the costs of court officers, but which bore also upon the fund for the compensation of witnesses, and limited its amount. Moreover, while the legislature might perhaps have denied to officers all participation in the fine and forfeiture fund, it has most clearly evinced a contrary intention by this enactment, and this intention would be entirely defeated if this act is upheld as to the subject expressed in its title and adjudged bad, as it must be, in respect of the clerk and sheriff, for with one moiety of the fund appropriated to witnesses and the other to the payment of "present outstanding claims," there is not and could never be any part of it or any other fund available for the payment of officers' costs.

For these reasons—and others, growing out of pre-existing law on the subject, might be given—we conclude that the provisions of the statute in their application to officers and witnesses are not separable, that to strike out its references and attempted provisions for

officers' costs would not leave the act to operate according to its terms and clear intent even as to witnesses, and that, of consequence, the whole act is unconstitutional and void.

Plaintiff expressly claimed under this void act, the complaint in terms counts upon the provisions of it which we have discussed. The demurrer raised the question of the constitutionality of the enactment. It should have been sustained. For the error committed in overruling the demurrer the judgment of the circuit court must be reversed. Other questions presented by the record need not be considered. The cause is remanded.

Reversed and remanded.

Lewis v. Simon & Co.

Statutory Action of Detinue.

1. *Pleadings; want of consideration, and not fraud in execution of the note.*—A plea alleging that the defendant executed the note and mortgage on the representation by their agent that plaintiffs would lend him a certain sum of money, which they failed to do, does not show fraud in the execution of the note and mortgage, but the want of consideration therefor.

2. *Joinder in issue; waiver of insufficiency.*—Where plaintiffs do not interpose demurrers to special pleas, but their replication thereto is, in legal effect, a mere joinder in issue upon such pleas, they will be presumed to have waived any defects therein, and the trial must be had without reference to any insufficiency of said pleas.

3. *Abstract charges; not reversible error to give them.*—There is no reversible error in giving charges which assert correct propositions of law, but which, in the particular case given, may be abstract.

4. *Charge to jury.*—When issue is joined on a plea of the failure of consideration, and the defendant testifies that the note and mortgage, which formed the basis of the claim to the property sued for, were executed upon a promise by the plaintiffs' agent that they would lend defendant a certain sum, that plaintiffs had refused to make the loan, and that defendant had received nothing in consideration of the note and mortgage, it is error to refuse a charge asked by the defendant which asserts "If the promise was in fact made by plaintiffs, through their agent, to let defendant have five hundred dollars in money on the mortgage and note, then plaintiffs can not recover."

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5. *Action of detinue; want of consideration for the mortgage as a defense.*—Where the plaintiffs' title in a detinue suit depends upon a mortgage, the defendant mortgagor may, under the provisions of section 2720 of the Code, as amended by act approved February 21, 1893, (Acts 1892-93, p. 1127), defend on the ground of the want or failure of consideration for the mortgage.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN R. TYSON.

This was a statutory action of detinue brought by the appellees, Laz. Simon & Co., against the appellant; and sought to recover certain described personal property.

To the complaint the defendant pleaded 1st, The general issue; 2d, want of consideration; and 3d, that the plaintiffs had no right, title, interest or claim in the property sued for, nor any possession or right of possession thereto at the commencement of the action. The defendant's fourth plea was as follows: "Fraud in the execution of the note and mortgage, which are the foundation of this suit. And defendant avers that on or about the 23d day of March, 1892, Jake Simon, representing himself to be the agent of Laz. Simon & Co., and being the agent of plaintiffs, of Louisville, Ky., falsely and fraudulently promised and agreed for them and in their name to let defendant have \$500 in money, at that time having no intention to keep said promise, provided defendant would execute a promissory note for \$500, payable at the banking house of Josiah Morris & Co. to the order of plaintiffs and secure the same by a mortgage upon certain property, viz., the property sued for in this action. That relying upon this false and fraudulent representation and promise of the said Jake Simon as hereinabove particularly recited, defendant thereupon on, to-wit, the 23d day of March, 1892, did execute a note for \$500, payable to the order of Laz. Simon & Co. at the banking house of Josiah Morris & Co. on the 1st day of September, 1892, and did thereupon execute a mortgage bearing even date with said note on the following described personal property, to-wit, all the bar fixtures, glass ware, cash register and an iron safe which defendant was then using in a certain store-house on the west side of Commerce street in the city of Montgomery, Alabama, to secure the payment of said note at the maturity thereof, and defendant avers that said note and mortgage are the foundation of this

action and that plaintiff claims title to the property sued for upon said note and under said mortgage. And defendant avers that he thereupon surrendered said note and mortgage to said Jake Simon, as the agent of plaintiffs, upon the distinct promise and agreement that he would draw on said Laz. Simon & Co. at Louisville, Ky., for said sum of \$500, and that he would obtain that sum from said Laz. Simon & Co., the plaintiffs, under and upon said note and mortgage and would promptly pay the same to the defendant; that a few days thereafter said Jake Simon informed defendant that Laz. Simon & Co. had written him that they were not bankers, and had no money to advance under and upon said note and mortgage, and thereupon promised defendant that he would give said note and mortgage back to defendant, and cancel the same, that he had said papers at his house, and had forgotten to bring them down that morning to defendant, and that defendant need not give himself any uneasiness or alarm on account of the same. And defendant avers that notwithstanding the false and fraudulent representations made by plaintiff's said agent, and notwithstanding the fraud practiced upon defendant in order to procure and induce the execution of said note and mortgage as aforesaid, the plaintiffs fraudulently kept and retained the same and had the mortgage recorded in the probate office of Montgomery county, Alabama. And defendant avers that he has never received any money or other thing of value under said mortgage or upon said note; that the same are entirely without consideration and void for fraud in the execution thereof as aforesaid."

The plaintiffs demurred to the 4th plea of the defendant, and the demurrers being overruled, they filed replications to the 2d, 3d and 4th pleas. The first replication was a general denial of all the allegations of the said pleas; and the 2d was in the following language: "For further answer to said 2d and 4th pleas, the plaintiffs say, that heretofore, viz., on the 23d March, 1892, and long prior to that time, the defendant was indebted to the plaintiffs in the sum of about two hundred dollars, evidenced by two promissory notes or bills of exchange, one of which was due on the 25th March, 1892, and the other on the 25th April, 1892. That the said obligation of defendant to plaintiffs had been several

times renewed on account of the inability of the defendant to pay the same, and that on or about the 23d day of March, 1892, the defendant proposed to plaintiffs that if plaintiffs would pay the said two obligations, which had before that time been discounted, and thereby further extend the time of payment of said two obligations, and in addition to the amount thereof would furnish to defendant goods and money, about one-half each, to the amount of about three hundred dollars more, he, defendant, would execute to plaintiffs a mortgage on certain personal property to secure the payment of the said two obligations and the further advances to be made. That plaintiffs agreed to the said proposition and the defendant executed the note and mortgage, the basis of this suit, or upon which plaintiffs claim their right of recovery, and delivered the same to plaintiffs. That in accordance with said agreement, plaintiffs paid for said defendants the said two obligations, which had before that time been transferred to the German Bank of Louisville, Ky., and also shipped to the defendant certain goods, which the defendant refused to receive, but demanded of plaintiffs the payment to him, defendant, of the full sum of three hundred dollars in money, which plaintiffs refused to do, but offered to comply with their said contract to furnish said defendant with goods and money to the amount of the said sum of three hundred dollars in the proportion agreed upon, and plaintiffs aver that the said two hundred dollars paid by them for the defendant are still due and unpaid, and are secured by the said mortgage, and plaintiffs aver that they do not claim any amount as due on said note and mortgage, except the amount of the said two obligations, and the interest thereon."

On the trial of the case, as is shown by the bill of exceptions, the plaintiffs introduced in evidence the note and mortgage, which were signed and duly executed by the defendant, and which constitute the basis of their claim to the property sued for; and also in rebuttal to the defendant's evidence, introduced evidence tending to support the allegations of the replication No. 2. The amount of the indebtedness set up by said replication, as "about \$200," the testimony for the plaintiffs tended to show was evidenced by two notes, which were executed by the defendant to the plaintiffs for the sum of

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\$98.33, each dated January 25, 1892, and payable 60 and 90 days from date.

The defendant's evidence was in conflict with that of the plaintiffs, and tended to support the several defenses set out in the pleas; but also tended to show that the two notes for \$98.33 were each presented at maturity, and were not paid.

Upon the introduction of all the evidence the court, at the request of the plaintiffs, gave the following written charges: (1.) "The burden of proving fraud or misrepresentation in obtaining the mortgage, and the burden of proving that there was no consideration for said mortgage, or that the consideration has failed, is upon the defendant, and unless the jury are satisfied from all the evidence, either that there was fraud or misrepresentation in obtaining the mortgage, or that the same was without consideration, or that the consideration for which said mortgage was given has failed, the verdict must be for the plaintiffs." (2.) "The court charges the jury, that there must have been the false or fraudulent representation of some fact as existing or as having existed to constitute fraud and misrepresentation in the execution of the mortgage. A mere promise to perform or do something in the future would not be sufficient." The defendant excepted to the giving of each of these charges, and also separately excepted to the refusal of the court to give each of the following written charges requested by him: (1.) "If plaintiffs demanded of the defendant payment of the two notes in evidence for \$98.33, each, at and on the date of maturity, respectively, this, under the facts of this case, will defeat a recovery on the part of plaintiffs." (2.) "If the promise was in fact made by plaintiffs through their agent to let defendant have five hundred dollars in money on the mortgage and note, then plaintiffs can not recover."

There was judgment for the plaintiffs. The defendant appeals, and assigns as error the overruling of the demurrer to the plaintiffs' replication, and the giving of the charges requested by the plaintiffs, and the refusal to give the charges requested by the defendant.

A. A. WILEY and JOHN G. WINTER, for appellant.—The first charge requested by the plaintiffs should not have been given.—*Bray v. Comer*, 82 Ala. 183, 1 So. Rep. 77; *Lehman Bros. v. McQueen*, 65 Ala. 570; *Steed v. Hinson*,

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76 Ala. 298; *Stringfellow v. Ivie*, 73 Ala. 209; *Wilkerson v. Tillman*, 66 Ala. 532. The second charge given at the request of the plaintiffs does not assert a correct proposition of law, and, therefore, should not have been given.—*Manning v. Pippin*, 86 Ala. 357, 5 So. Rep. 572; *Manning v. Pippin*, 95 Ala. 537, 11 So. Rep. 56; *Piedmont L. & Imp. Co. v. Piedmont F. & M. Co.*, 96 Ala. 389, 11 So. Rep. 332. When issue is joined on a defective plea, without objection to it, advantage can not be taken of its defects by instructions to the jury.—*Memphis & Charleston R. R. Co. v. Graham*, 94 Ala. 545, 10 So. Rep. 283; *Hughes v. Southern Warehouse Co.*, 94 Ala. 613, 10 So. Rep. 133; *E. T. V. & G. R. R. Co. v. Thompson*, 94 Ala. 636, 10 So. Rep. 280. The second charge requested by the defendant should have been given. The failure or want of consideration was set up in the second plea, and upon this plea plaintiffs joined issue. This is true also of the 4th plea. The testimony for the defendant tended to prove the defense as set up in this second plea, and the second charge should, therefore, have been given. *Harrison v. Hicks*, 1 Port. 423; *Ellington v. Charleston*, 51 Ala. 169; *Burns v. Campbell*, 71 Ala. 285; *Reeves v. Skipper*, 94 Ala. 407, 10 So. Rep. 309; *M. & C. R. R. Co. v. Graham*, *supra*; *Hughes v. S. W. Co.*, *supra*; *E. T. V. & G. R. R. Co. v. Thompson*, *supra*.

THOS. H. WATTS and CHAS. WILKINSON, *contra*.—The first charge requested by the plaintiffs was properly given. The defendant pleaded that the mortgage was obtained by fraud, and the burden was, therefore, upon him to sustain said pleas.—*Moses v. Katzenberger*, 84 Ala. 95, 4 So. Rep. 237; *Lehman v. McQueen*, 65 Ala. 570; *McWilliams v. Phillips*, 71 Ala. 80; *Shulman v. Brantley*, 50 Ala. 81; *Timberlake v. Brewer*, 59 Ala. 108. The second charge requested by the plaintiffs was properly given.—*Foster v. Johnson*, 70 Ala. 249; *Johnson v. Cook*, 73 Ala. 540; *Smith v. Kirkland*, 81 Ala. 351, 1 So. Rep. 276; *Davis v. Snider*, 70 Ala. 317; *Morris v. Harvey*, 4 Ala. 300-305; *Pacific Guano Co. v. Anglin*, 82 Ala. 494, 1 So. Rep. 852.

COLEMAN, J.—Suit in detinue by appellees to recover personal property. The defendant pleaded, 1st, the general issue; 2d, want of consideration; and, 4th, a

special plea. There was a demurrer to the 4th plea, which being overruled, the plaintiff replied to the 2d and 4th pleas.

In the 4th plea of the defendant, it is averred that plaintiffs' title was derived from a mortgage executed by defendant to plaintiffs to secure a note for five hundred dollars. The beginning of the plea is, "Fraud in the execution of the note and mortgage," &c. It continues then to state the facts of the defense. These facts show that defendant was fully advised of the contents of the note and mortgage and their legal effect before and at the time the same were executed. Accurately speaking, the plea shows by its statement of the facts, that there was no fraud "In the execution of the note and mortgage."—*Smith v. Kirkland*, 81 Ala. 345, 1 So. Rep. 276; *Foster v. Johnson*, 70 Ala. 249; *Davis v. Snider*, *Ib.* 315; *Johnson v. Cook*, 73 Ala. 537; *Pacific Guano Co. v. Anglin*, 82 Ala. 492, 1 So. Rep. 852; *Morris v. Harvey*, 4 Ala. 300; *Kelly v. Mobile Building Asso.*, 64 Ala. 503. The facts stated in the plea, if true, show that the note and mortgage were executed without consideration.

There was no demurrer either to the second or fourth plea, raising the question as to whether in a suit in detinue to recover personal property, the plaintiffs' title resting in a mortgage, want or failure of consideration is an available defense. The replication to these two pleas was merely a more specific statement of facts upon which plaintiffs relied to recover, and was in legal effect a mere joinder in issue.—*Herring v. Skaggs*, 73 Ala. 446; 1 Chitty on Pleading, 624. Treated purely as a replication, it may have been defective.—*Winter v. Mobile Sav. Bank*, 54 Ala. 172; *Barbour & Son v. Washington Fire Ins. Co.*, 60 Ala. 433.

There was evidence tending to support plaintiffs' case, and there was evidence tending to support the pleas of the defendant. There was no reversible error in the two charges given at the request of the plaintiffs. Each contained correct propositions of law, although each asserted a proposition of law which might be regarded as abstract. There was no proper plea which set up as a defense "fraud in the execution of the mortgage," and no competent evidence to support a plea of that character.

We think the court erred in refusing the second charge requested by the defendant. If the jury believed the
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evidence of the defendant, his pleas of failure of consideration were sustained. He had testified that the note and mortgage were executed upon a promise to loan him five hundred dollars, and that plaintiffs had refused to make the loan, and that defendant had received nothing in consideration for the note and mortgage. In view of this evidence, the charge should have been given. We have said issue was joined on the pleas, and the defendant had the right to a trial of the issues without reference to their sufficiency.—*Reeves v. Skipper*, 94 Ala. 407, 10 So. Rep. 309; *M. & C. R. R. Co. v. Graham*, *Ib.* 545, 10 So. Rep. 283, and authorities cited.

Quere? When plaintiffs' title in a suit in detinue depends upon a mortgage, can its validity be tried by showing that the mortgagor does not owe the debt, upon the ground of the failure or want of consideration? By act approved January 27th, 1883, (Acts of 1882-83, p. 31), it was provided that where the title of the plaintiff in a detinue suit was derived from a mortgage, the defendant might plead any defense which could have been pleaded to an action to recover the debt. Section 2720 of the Code of 1886 was substituted in the place of the act. The statute as codified is not so clear as the act of the legislature *supra*; but the Code provides that upon the suggestion of the defendant, the jury may be required "to ascertain the amount of the mortgage debt, and such ascertainment must be entered on the record of the judgment, and the court must order that if the debt so ascertained, interest and cost, be paid within thirty days, no execution or other process shall issue on the judgment;" &c. By act approved February 21, 1893, (Acts of 1892-93, p. 1127), section 2720 of the Code of 1886 was amended so that the defendant could plead "to the consideration of the instrument relied upon." The rule as to suits in ejectment under a mortgage, and for the recovery of chattels is not the same.—*Slaughter v. Swift*, 67 Ala. 494; *Jackson v. Scott*, *Ib.* 99; *Ellington v. Charleston*, 51 Ala. 166; *Burns v. Campbell*, 71 Ala. 271. Reversed and remanded.

Wharton v. Hannon.

Bill in Equity to enjoin the Obstruction of an Alley-way.

1. *Easement; indefinite description made certain by subsequent designation.*—When a deed granting an alley-way or other easement is indefinite in its description of the particular location of the way, but the grantor afterwards definitely locates the easement intended to be conveyed, after which the grantee entered into actual possession and enjoyment, and continued therein for a long time, such location and delivery of possession is a designation of the way conveyed by the deed, and the grantee's right thereto becomes as fixed and irrevocable as if the deed had accurately and definitely described such location.

2. *Bill in equity to enjoin obstruction of alley-way; evidence.*—Where, on a bill filed to enjoin the obstruction of an alley-way it is shown that the description in the deed granting the said way from the defendant to the complainant was indefinite, but that after the grant the way was definitely located by the defendant, and was used by the complainant, evidence of oral statements made by the parties prior to the execution of the deed, indicating a purpose on the part of the grantor to acquire at some future time other adjacent lands, and locate a way different from that which was located, is incompetent.

3. *Enjoining obstruction of alley-way; jurisdiction of equity.*—Where a deed granting an alley-way does not definitely describe the location thereof, but the way is designated by the grantor and is accepted and used by the grantee, and the said grantor afterwards obstructs the way thus designated and used, a court of equity, upon proper bill filed, will enjoin such obstruction, notwithstanding a better alley-way has been opened by the grantor and offered to the grantee, and although the use of the obstructed alley-way involves the crossing with teams, &c., of a sidewalk on a much used street in a city. (STONE, C. J. dissenting, holds that, in the absence of the averment, that the grantor was insolvent, and of facts showing that complainant could not obtain ample redress in an action at law, and in view of the fact that another and better way was tendered, the granting of an injunction is discretionary, and complainant in this case should be left to his action at law.)

4. *Same.*—In such a bill, filed to enjoin the obstruction of an alley-way by the grantor, there should be averments that the location of the alley-way was made, and a description of the way so located; proof of location without averment is not sufficient to warrant relief.

APPEAL from the City Court of Montgomery, in Equity.
Heard before the HON. THOS. M. ARRINGTON.

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The bill in this case was filed by the appellee, T. W. Hannon, against W. G. Wharton; and prayed to have the defendant perpetually enjoined from obstructing an alley-way, of which the complainant alleged in his bill he was entitled to have the free and unobstructed use.

The bill of complainant sets out the purchase of the right of way in question from the defendant by Hannon & Co., and the subsequent purchase by T. W. Hannon of Hannon & Co.'s interest. After the purchase a deed to the said alley-way was given, describing the same as is set forth in the opinion; and after alleging the use and occupation of said alley-way by complainant, and the obstruction of the same by the defendant, the prayer was for an injunction. There were no allegations in the bill showing the location of the alley-way. The principal facts of the case are sufficiently stated in the opinion.

At the time of the execution of the deed granting the alley-way, the grantor, Wharton, owned only the south half of lot No. 1, and Commerce street was the only street upon which his property abutted. The defendant introduced parol evidence tending to show that the sale of the alley-way was negotiated with the defendant by one Anderson for Hannon & Co., and that there was an understanding between the defendant and said Anderson that if the defendant bought the remainder of lot No. 1, which he intended to do, he could give a right of way across the rear of lot No. 1 to Tallapoosa street; and that it was for this reason the deed, although it defines the right of way across lot No. 2, does not define it across lot No. 1, or designate the street to which the out-let was to be given. It was also shown by the evidence that the defendant, Wharton, did purchase the remainder of lot No. 1, and that he opened an alley-way across the rear thereof to Tallapoosa street, and that for many reasons this alley-way was much more convenient than the one which had been used by the complainant, and which the said Wharton closed up after the opening of the alley-way to Tallapoosa street.

Upon the submission of the cause, upon the pleadings and proof, the chancellor decreed that the complainant was entitled to the relief prayed for, and ordered the temporary injunction made perpetual. The defendant appeals, and assigns as error this decree of the chancellor.

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TOMPKINS & TROY, for appellant.—The appellee was not entitled as a matter of right to an injunction restraining the grantor from obstructing the alley-way involved in this suit. He is not entitled to an injunction, but will be left to his remedy at law, unless he shows that the obstruction sought to be enjoined will produce irreparable injury.—1 High on Injunc., §§ 848, 886; *Roman v. Strauss*, 10 Md. 89; 3 Pom. Eq. Jur., § 1338; *Chambers v. Ala. Iron Co.*, 67 Ala. 353. Courts consider the convenience and inconvenience to the parties and to the public; and where, by granting an injunction, great injury will result to one of the parties, or inconvenience will result to the public, while, by its refusal, little, if any, damage will be done to the party seeking the injunction, it will be refused. *McBryde v. Sayre*, 86 Ala. 462, 5 So. Rep. 791; *Western Ry. v. Ala. Gr. Trunk R. R. Co.*, 96 Ala. 272, 11 So. Rep. 483-7; *Zabriskie v. R. R. Co.*, 13 N. J. Eq. 314.

CHARLES WILKINSON, *contra*.—The chancery court had jurisdiction of this case, and rightfully exercised its jurisdiction in enjoining the obstruction of the alley-way involved in this suit.—*Lide v. Hadley*, 36 Ala. 632; *Ninninger v. Norwood*, 72 Ala. 281; *Boulo v. N. O., M. & T. R. Co.*, 55 Ala. 480; High on Injunc., § 501; 5 N. Y. Chancery 537; 3 N. Y. Chancery 538 note; 7 N. Y. Chancery 1186; *Hill v. Miller*, 3 Paige 254; *Trustees v. Cowen*, 4 Paige 510; *Seymour v. McDonald*, 4 Sandford Ch. 502; 2 Story. Eq., § 925-6-7.

Wharton could not convey to the complainant an alley-way in land that he did not own; and the designation by him of the alley-way over that part of lot No. 1 which was owned by him at the time of the execution of the deed, fixed complainant's right.—*Hoole v. Atty Gen.*, 22 Ala. 190; *Lide v. Hadley*, 36 Ala. 632; *Baugan v. Mann*, 59 Ill. 492; *Bushnell v. Scott*, 21 Wis. 451.

HEAD, J.—On the 18th day of May, 1882, Hannon & Co. acquired by deed from W. G. Wharton and wife, an easement thus described: "The privilege and right of way to use and pass over with their horses, mules, wagons, teams, drays, trucks, carriages, employees or persons for all mercantile or business purposes a lane or alley way at least eighteen feet wide on and through the rear part of lot number two in square number eight, East

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Alabama plat, and a lane or alley way of at least twelve feet wide on and through lot number one in square number eight, East Alabama plat," in the city of Montgomery, Alabama; "and for all time to come said right of way over and through said lots is hereby conveyed, for the purpose of giving the owners, occupants or tenants of buildings of store No. 57 Commerce street an approach and outlet free and open at all times from the rear of said premises to the street." The appellee, one of the firm of Hannon & Co., afterwards acquired the rights of his co-partner in this easement. There is no controversy in reference to the eighteen feet way, the grantee being in the undisturbed enjoyment of it; but the complaint of Hannon, the grantee, is that Wharton, the grantor, has obstructed and denied him the use of the twelve feet way, and he prays for, and obtained in the lower court, injunction of that obstruction. It is observed that the deed is indefinite as to the particular location of the twelve feet way; so much so that the identity of the way intended to be granted could not be ascertained from it alone. The evidence, however, very clearly discloses that immediately after the grant the way intended to be conveyed was definitely located and marked by the parties, and passed to the actual possession and enjoyment of the grantees, who continued therein unmolested until the happening of the grievances complained of in the present bill—a period of some nine years. Such a location and delivery of possession aids the deed and secures to the grantee a good title and right to the possession of the way so located, as fixed and irrevocable as if the deed itself were perfect.—*Bannon v. Angier*, 2 Allen, (Mass.) 128; *Osborn v. Wise*, 7 C. & P. 761; *Kraut's Appeal*, 71 Pa. St. 64; *Jennison v. Walker*, 11 Gray (Mass.) 426; *Jones v. Percival*, 5 Pick. 485; *Wynkopp v. Burger*, 12 Johns. (N. Y.) 222. The right of way being thus secured and defined by the deed and location, and the possession and enjoyment of the grantees thereunder, it is not permissible to introduce prior oral statements of the parties indicating a purpose, on the part of the grantor, at some time in the future to acquire other adjacent land and make a location of the way different from that which was made, and over the land so to be acquired. Nor is it material that a better way of ingress and egress has

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been opened by the grantor and offered to the grantee. The latter's rights are such as he acquired by his contract, and it is for him to determine whether he will surrender them and accept some other benefit in their stead. It is very clear that the fact that the use of complainant's alley-way involves the crossing, with his teams &c., of the sidewalk on Commerce street, does not make a case of such public detriment or inconvenience as justified defendant in closing the alley, or will induce the court to withhold the exercise of its remedial powers, otherwise properly invoked, to secure to the grantee the enjoyment of his easement.

Upon the evidence, therefore, as we find it in the record, we would have no hesitation in affirming the decree of the city court, but there is an omission in the bill which must work a reversal. As we have seen the deed, in itself, is imperfect, in that it fails to identify the particular land intended to be covered by the easement. It required location under it. In order to obtain relief the complainant was required to allege, as well as prove, that the location was made, and describe the way so located. Proof without allegations is not sufficient.—*McDonald v. Mobile Life Insurance Co.*, 56 Ala. 468; *Goldsby v. Goldsby*, 67 Ala. 560.

The bill fails to show the location. For this omission the decree is reversed, and the cause remanded.

STONE, C. J., dissenting.—Under the facts set forth in this record, I do not think the remedy by injunction should be allowed. There is no averment that the grantor of the easement is insolvent, and Hannon can obtain ample redress in an action at law for damages. I base my opinion on the fact that another and better outlet is tendered, in lieu of the one sought to be obstructed; and to grant injunction in a case like the present one has the appearance of operating a great hardship on Wharton, while the injury to Hannon, if any is suffered, is very slight in comparison with it. The granting or withholding injunction in such a case is discretionary, and I think the complainant should be left to his action at law.—*Chambers v. Ala. Iron Co.*, 67 Ala. 353; *Davis v. Sowell*, 77 Ala. 262; *McBryde v. Sayre*, 86 Ala. 458; 5 So. Rep. 791; *Clifton Iron Co. v. Dye*, 87 Ala. 468, 6 So. Rep. 192.

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Bill in Equity to establish Title, and to remove Cloud from Title.

1. *Bill to re-establish a lost deed; insufficient averments.*—A bill filed to re-establish a lost deed, which, without verification, merely states that complainant caused the lot to be bought and paid for, that the legal title was conveyed, that the deed was not recorded, but, after delivery, was lost or destroyed in some way, unknown to complainant, but fails to show how, when or by whom it was lost, what it contained, what title or interest it conveyed, or what consideration, and by whom paid, contains insufficient averments to warrant the relief prayed for, and is demurrable.

2. *Cloud on title; adverse possession.*—When, on a bill filed to remove a cloud from title, adverse possession in the complainant is relied on as a ground for the relief prayed, the bill is not demurrable, on the ground of the want of jurisdiction in a court of equity to grant the relief prayed for, since in an action of ejectment brought by the adverse party, the right of the complainant could only be effectuated by extraneous evidence.

3. *Same; bill to quiet title.*—One who has acquired title by adverse possession, can not be guilty of *laches* in instituting a suit to quiet his title and to remove as a cloud the title of another, who disputes the complainant's title acquired by adverse possession.

4. *Bill filed by corporation; failure to aver a right to acquire property.* A bill filed by a corporation to quiet its title and to remove a cloud therefrom is not demurrable because it fails to aver that the complainant corporation had the power under its charter to acquire and hold the lot; in the absence of proof to the contrary, the corporation will be presumed to have had such power.

APPEAL from the Chancery Court of Mobile.

Heard before the Hon. W. H. TAYLOR.

The bill in this case was filed by the appellant, the Torrent Fire Engine Company, Number 5, against the appellee, the city of Mobile; and sought to have the title of the complainant to a certain lot in the city of Mobile established, and the title of the city of Mobile, as it appears on the records, divested out of said city, and removed as a cloud on complainant's title.

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The bill alleged, in substance, that the complainant was a fire extinguishing corporation, and that as said corporation owned a fire engine and other apparatus, and, determining to buy a lot, upon which to build a house, it purchased from the defendant the lot now in controversy, and erected a building thereon, which was used as an engine house; that this purchase was made in 1850; that the complainant took possession thereof at once, and from that time up to the filing of the bill, July 30, 1892, it had been in the exclusive, open, notorious, continuous and undisturbed, adverse possession of said property, using and claiming the same openly, notoriously, and continuously as its own property, against all the world; that about a year before the filing of the bill it undertook to sell the said property, and complainant discovered, for the first time, that the title to said property was still upon the records in the name of the city of Mobile; that upon the request of the complainant the city of Mobile declined to execute a quitclaim deed to the purchaser, and has since that time, set up a claim to some interest in the said property. The bill contains the further allegations that the complainant can not find any deed to it from the city of Mobile, but it charges that the legal title to said property was, in fact, conveyed to it by the said city, and the deed conveying the same, was not recorded, and had, in some manner unknown to the complainant, been lost or destroyed. By amendment it was further alleged that if the complainant was mistaken in the allegations of the original bill, and that the property was not, in fact, conveyed to it by the city of Mobile, and such conveyance was not recorded, and in some manner was lost or destroyed, still the complainant had a legal title to said property by adverse possession, which was shown by the allegations of the original bill—having been in adverse possession thereof for 40 years. The relief in its double aspect, as prayed for in the bill, is sufficiently stated in the opinion.

The defendant interposed several demurrers to the bill, among which were, that the simple averments of the bill that the deed executed by the defendant to the complainant had been lost, is not sufficient to give equitable jurisdiction; that the averments of the bill were insufficient to give a court jurisdiction to remove a

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cloud on complainant's title; that by the averments of the bill the complainant is shown to have been guilty of *laches* in not having heretofore asserted his right in the premises; and that it is not shown by the averments of the bill that the complainant had the right to acquire property. The chancellor sustained the several grounds of demurrer; and on this appeal by complainant his decree is assigned as error.

GREGORY L. & H. T. SMITH, for appellant.—The bill in this case contains equity upon the ground that the legal title to the property was in the complainant by adverse possession, but rested in parol; and as complainant was in possession, there was no remedy at law whereby the title could be established and quieted against the adverse claim of the city of Mobile. The equity of the bill in this respect is fully decided and settled by the case of *Echols v. Hubbard*, 90 Ala. 314, 7 So. Rep. 817.

PILLANS, TORREY & HANAW, *contra*.—While the chancery court will decree the reformation or the establishment of a deed in proper cases, the bare allegation that a deed is lost will not authorize the relief in equity.—1 Story's Eq. Jur., §§ 79–84; *Griffin v. Fries*, 2 So. Rep. 266; s. c. 23 Fla. 173; *Whitfield v. Fausset*, 1 Ves. Sr. 387; *Rodgers v. Cross*, 3 Chand. (Wis.) 36. Courts of equity will refuse relief in cases where the demand has become stale by reason of neglect or *laches*, or by reason of the acquiescence on the part of complainant.—*Nettles v. Nettles*, 67 Ala. 599; *James v. James*, 55 Ala. 525; *Greenlees v. Greenlees*, 62 Ala. 330; *Harrison v. Hefflin*, 54 Ala. 552; Perry on Trusts, § 869; 1 Pom. Eq., §§ 418–419.

HARALSON, J.—The bill in this case is filed in a double aspect: *First*, on the theory, and on allegations to support it, that the city of Mobile conveyed to complainant the lot of land referred to in the bill, and that the deed conveying the same was not recorded, but was, after the same had been duly executed and delivered, in some manner unknown to complainant, lost or destroyed; and on this aspect of the case, complainant seeks relief on the ground, that the recorded deed of the city from

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its grantor, executed in the year 1849, is a cloud on complainant's title, which interferes with its making sale of said lot, which cloud, it seeks to have removed by having its title to the property established and quieted and the property decreed to belong to complainant. *Second*, on the theory, that complainant has the legal title to the property by adverse possession, having, as alleged, been in the exclusive, open, continued, notorious and undisturbed possession and occupation of said property, using and claiming the same openly, notoriously, continuously and adversely against all persons, from 1850, the date of its alleged deed from the city, until the present time, on which ground it seeks relief. The relief sought in each alternative aspect of the case is the same, in that, in each, complainant seeks to have its title established and quieted, and the title vested in the city, by virtue of its deed to the property from its grantor, divested, and said deed removed as a cloud on complainant's title.

1. There can be no question of the authority of a court of chancery to re-establish a deed which has been lost or destroyed by accident; but it seems to be well settled, that the mere loss of a deed is not always ground for coming into a court of equity for relief on account of such loss or destruction, for, if there is no more than that in the case, a court of law may afford just relief; since it will admit evidence of the loss and contents of a conveyance, just as a court of equity will do. So, to enable one to come into equity for relief in case of a lost deed, he must show that there is no remedy at law which is adequate and adapted to the circumstances of his case. "The bill," says Story, "must always lay some ground, besides the mere loss, to justify a prayer for relief, as that the loss obstructs the rights of the plaintiff at law, or leaves him exposed to undue perils in the future assertion," and it might have been added, enjoyment, "of such rights."—1 Story Eq. Jur., § 84; *Lancy v. Randlett*, 80 Me. 169; *Donaldson v. Williams*, 50 Mo. 407; *Griffin v. Fries*, 2 So. Rep. (Fla.) 266; *Cummings v. Coe*, 10 Cal. 29.

The bill in this case was not sworn to, and it fails to show how, when or by whom the deed was lost. It contains no description of the contents of the deed, the title or interest conveyed by it, nor the consideration paid, and by whom paid. It merely states, "that the

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legal title to said property was in fact conveyed to it by said city, and that the deed conveying the same was not recorded, and was, after the same was duly executed and delivered, in some manner unknown to complainant, lost or destroyed;" and that complainant caused said lot to be purchased and paid for. It, therefore, presents insufficient grounds for relief on this phase of the case, and the grounds of demurrer interposed, questioning relief based on this theory, were properly sustained.—1 Story. Eq. Jur., §§ 82, 88; *Hoddy v. Hoard*, 12 Ind. 474, s. c. 54 Am. Dec. 46; Cooper's Eq. Pl., 125, 126.

2. Of the second alternative, on which the bill seeks to proceed, it may be said, that "A court of equity will not interpose to prevent or remove a cloud which can only be shown to be *prima facie* a good title, by leaving the plaintiff's title entirely out of view. It is always assumed, when the court interferes, that the title of the party complaining is affected by a hostile title, *apparently* good, but really defective and inequitable by something not appearing on its face."—*Rea v. Longstreet*, 54 Ala. 294; *Lytle v. Sandefur*, 93 Ala. 399, 9 So. Rep. 260. The test, as we have heretofore laid it down, is: "Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist. If the proof would be unnecessary, no shade would be cast by the presence of the deed." In this case, if complainant were sued by the city for this land in an action of ejectment, founded on the deed from its grantor, it, complainant, would necessarily have to introduce oral proof of its adverse possession to defeat a recovery.

We have accordingly held, that when adverse possession is relied on by a complainant, as a ground for the removal of a cloud on his title, the right of necessity must be effectuated by extraneous evidence, and equity may always be invoked, in the absence of legal remedies, to quiet a title thus resting in parol. The grounds of demurrer which question the insufficiency of the bill, to remove a cloud on complainant's title, should have been overruled, and the bill retained as one for that purpose.—*Echols v. Hubbard*, 90 Ala. 309, 319, 7 So. Rep. 817; *Marston v. Rowe*, 39 Ala. 722; *Arrington v. Liscom*, 34 Cal. 365; *Moody v. Holcomb*, 26 Texas 714.

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3 It is objected, on demurrer, that complainant has delayed too long in filing this bill, and is guilty of such *laches* as bar its right of relief. The city has no right founded on its deed, which would enable it to maintain or defeat a suit for the land, as against complainant's plea and proof of adverse possession as set up in the bill. Whom then did the alleged *laches* of complainant injure, and who has any right to complain on that score? If any rights have been lost by *laches*, it has been by the city, in acquiescing so long in complainant's claim. One who has acquired title by adverse holding, can not be said to be guilty of *laches* in not bringing a suit to remove, as a cloud, the title of another, who disputes his title by adverse possession. Long delay on the part of him, who might have dispossessed the adverse holder by suit begun in time, is the very basis of the title of the latter. The lapse of time, which the law allows as a foundation of the title by adverse possession, can not be made the instrument or means for impairing or destroying one's rights and privileges growing out of that title.

4. The bill was not subject to demurrer on the ground that it does not aver that the complainant corporation had the power, under its charter to acquire and hold land.—*Boulware v. Davis*, 90 Ala. 211, 8 So. Rep. 84; *Ala. Gold. Life Ins. Co. v. Cen. Ag. & M. Asso.*, 54 Ala. 73.
Reversed and remanded.

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Action for Damages against a Municipal Corporation by an Employé for Personal Injuries.

1. *Action under sub-section 2 of section 2590 of the Code; sufficiency of complaint.*—In an action against a municipal corporation by a laborer employed by it, to recover damages for personal injuries, a count of the complaint which alleges that the defendant, through its agents and employés, intrusted with the superintendence of the work of digging gravel, buried a dynamite cartridge where said gravel was being dug, and that the plaintiff, being employed by defendant, was required to work at the place where the dynamite was buried, without
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being told that it was there, and that while digging as directed, not knowing the dynamite was buried at such place, struck said cartridge causing it to explode and inflicting upon him serious personal injuries, sets forth a good cause of action under sub-section 2 of section 2590 of the Code, which gives a right of action to an employé "When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence."

2. *Municipal corporation bound by acts of its agent or employé; when estopped from denying the legality of his appointment.*—Where one has served a municipal corporation in the capacity of superintendent of certain work carried on by said city, and the municipal authorities have accepted such service and received the benefit of his skill and labor, the municipal corporation can not avoid its responsibility for injuries resulting from his negligence in the doing of work within the scope of the service he was rendering, by denying the legality of his appointment.

3. *Action under sub-section 2 of section 2590 of the Code; erroneous charge to the jury.*—In an action against a municipal corporation by one of its employés, under sub-section 2 of section 2590 of the Code, to recover damages for personal injuries, alleged to have been caused by the negligence of the agent or employé of the defendant intrusted with the superintendence of the work at which the plaintiff was engaged, while in the exercise of such superintendence, in allowing a dynamite cartridge to be left at the place where the plaintiff was required to work, it is error to instruct the jury that, "If the dynamite causing the plaintiff's injury was carelessly and negligently left buried by the defendant, or its servants or agents in the discharge of their duty, before the plaintiff was employed by the defendant, and the plaintiff could not by the use of ordinary care and diligence, or precaution, have discovered the danger, then, I charge you, that the defendant is liable in this action, and your verdict should be for the plaintiff for such amount as you believe from the evidence he was damaged, not exceeding \$8,000"—the amount sued for.

APPEAL from the Circuit Court of Colbert.

Tried before the HON. H. C. SPEAKE.

The action in this case was brought by the appellee, Joe Harris, against the City Council of Sheffield, to recover damages for personal injuries sustained by the plaintiff, alleged to have been caused by the negligence of defendant's officers, agents or servants; and was commenced on April 14, 1890. The averments of the third count of the complaint, upon which the cause was tried, are set forth in the opinion. The defendant demurred to this count of the complaint upon the follow-

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ing grounds: "1st. It is in and by said complaint shown that the dynamite cartridge was buried by a fellow-servant, and that the place where it was buried was hidden. 2d. Said complaint fails to show that it was the duty of defendant to remove said dynamite cartridge. 3d. Said complaint fails to show that plaintiff, who was an employé, was acting under the instructions of any person in the service or employment of the defendant who had any superintendence intrusted to him, while in the exercise of such superintendence." This demurrer was overruled. The other facts pertaining to the questions considered and decided by the court are sufficiently stated in the opinion.

There was judgment for the plaintiff, assessing his damages at one thousand dollars. Defendant appeals, and assigns as error the rulings of the court upon the pleadings, the giving the several charges requested by the plaintiff, and the refusal to give the several charges asked by the defendant.

JO. H. NATHAN, for appellant.—The rule, as laid down by a long line of decisions in this State, may be stated to be, that the master is not liable to an employé who is injured through the negligence of any other employé, engaged in the same general employment, unless the master failed to exercise ordinary care and diligence in the selection of his employés.—*Cook v. Parham*, 24 Ala. 21; *M. & O. R. R. Co. v. Thomas*, 42 Ala. 672; *M. & M. R. R. Co. v. Smith*, 59 Ala. 245; *Tyson v. S. & N. R. R. Co.*, 61 Ala. 554; *Smoot v. M. & M. R. R. Co.*, 67 Ala. 13. If employés in the employment of the master are engaged in the same general business and performing duties and services for the same general purpose, they are fellow servants within the meaning of this rule, and the master is not liable.—*Mechem on Agency*, § 668; *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521; *Lawler v. Androscoggin R. R. Co.*, 62 Me. 463; *Blake v. Maine Cen. R. R. Co.*, 70 Me. 60; *McDermitt v. City of Boston*, 133 Mass. 349; *Flynn v. City of Salem*, 134 Mass. 351. The charges requested by the defendant should have been given.—*M. & O. R. R. Co. v. Thomas*, 42 Ala. 672; *M. & M. R. R. Co. v. Smith*, 59 Ala. 275; *Bull v. M. & M. R. R. Co.*, 67 Ala. 208; *Tyson v. S. & N. R. R. Co.*, 61 Ala. 554.

KIRK & ALMON, *contra*.—The general rule of law is

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that the superior or employer must answer civilly for the want of skill or negligence of his agent or servant by which another is injured. Municipal corporations fall within the operation of this rule of law, and are liable for damages when the requisite elements of liability exist.—*Dillon on Munic. Corp.*, §§ 968, 977-78; *Campbell v. City of Montgomery*, 53 Ala. 530; *City Eufaula v. McNab*, 67 Ala. 591; *City Council of Montgomery v. Wright*, 72 Ala. 411. A master is liable for the negligence of his superintendent in failing to exercise due care. When an employé is by the master or employer put in charge of certain work as superintendent he takes the place of the master, and his acts are the acts of the master, and such superintendent is not a fellow servant or co-employé of the other laborers or employés.—*Walker v. Bolling*, 22 Ala. 294; *Tyson v. S. & N. R. R. Co.*, 61 Ala. 554; *Wilson v. W. L. Co.*, 50 Conn. 221; *Wood's Master & Servant*, 862-67. The third charge requested by the plaintiff was properly given.—*Heckman v. Mackey*, 35 Fed. Rep. 353.

STONE, C. J.—The present case was in fact tried on the third, or amended count. It avers that plaintiff, Harris, an employé, was injured April 16, 1889, while digging gravel for defendant corporation; “that prior to said date the defendant (city of Sheffield), through its agents and employés entrusted with the superintendence of said work, buried a dynamite cartridge at the place where said gravel was being dug, and left it there unexploded, without giving notice or warning to any one that it was so buried, knowing it was dangerous to leave it in that hidden place unexploded, and that it was endangering the lives of persons who might be engaged in digging gravel. Yet the defendant, its agents or employés, as above stated, carelessly and recklessly, and without having any regard for the safety of persons digging gravel at that place, left said dynamite so buried, without giving any sign or warning of danger, and suffered it so to remain. And on the 16th day of April, 1889, plaintiff was employed by defendant to work on said streets and avenues, and was required to dig gravel for that purpose, and instructed to dig where defendant had hid and buried said dynamite, and plaintiff, not knowing that dynamite was buried at said place, began

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digging gravel, and without seeing said dynamite cartridge, or knowing it was there, struck it while digging gravel, and caused it to explode," &c. The plaintiff then sets out very serious personal injuries inflicted on him by the explosion.

This count clearly sets forth a good cause of action under sub-section 2 of section 2590 of the Code, and the demurrer to it was rightly overruled. We will not consider the sufficiency of the other counts. Even if the court erred in overruling the demurrers to them—a concession we must not be understood as making, or intending to make—it would be at most error without injury.

Plaintiff received his injury while digging in a bank of gravel, which was being used in filling up or coating the streets of Sheffield. No question is raised as to the service he was employed in. He was working for the city, being hired for the purpose. Nor is there proof of any negligence on his part, which led to the explosion and to the injury. There was no attempt to show that plaintiff was notified that an imperfectly exploded cartridge of dynamite had been left buried in the bank where he was put to work. He had not been in the employ of the city when, three days before, as is claimed, the cartridge was placed there, and attempted to be exploded. There is conflict in the testimony as to when or how the cartridge was placed there, and whether the city's authorities or employes had anything to do with it. The testimony for defense denies all participation in the placing of the cartridge, or knowledge that it was there. If Howard's testimony be true, it would seem the dynamite must have been there before the city commenced working at that place under his superintendency. There is no pretense, however, that plaintiff was notified of its being there, or that he received any warning, or caution in regard to it. So, no fault is chargeable to the plaintiff.

The testimony shows that Howard was in superintendence of the plaintiff and the other laborers, who were engaged in digging the gravel. This is not denied; but it is contended that he, Howard, was not elected or appointed to that superintendency in the mode prescribed by law, and that, consequently, any injury caused by his negligence while serving, or assuming to serve the

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city, can not fasten a charge upon the municipality. There is nothing in this objection. If he served the city in the capacity of superintendent of this work, and the city authorities acquiesced in such service and took the benefit of his skill and labor, the city will not be heard to deny the legality of his appointment, nor its responsibility for acts done by him within the scope of the service he was rendering. So far as the question affects its liability, he must be treated as if he were duly and legally appointed, until the city itself renounces and repudiates his acts. It can not appropriate the benefit and repudiate the burden.—*Ala. & Tenn. Rivers R. R. Co. v. Kidd*, 29 Ala. 221; *Talladega Ins Co. v. Peacock*, 67 Ala. 253; *Ala. Gr. So. R. R. Co. v. Hill*, 76 Ala. 303; *Reynolds v. Collins*, 78 Ala. 94; *Ala. Gr. So. R. R. Co. v. S. & N. R. R. Co.*, 84 Ala. 570, 3 So. Rep. 286.

As we have said, there was conflict in the testimony as to the placing of the dynamite cartridge which caused the injury. Plaintiff's witnesses testified that, on the Saturday last preceding the explosion on Tuesday, caused by plaintiff's pick, Howard himself, superintended and directed the blast at the place where the plaintiff received his injury. Howard testified that he had done no work at that spot until the morning of the explosion and disaster, and that he had made no blast there. This left a conflict as to how, or at whose hands the dynamite cartridge had been placed. The court, at the instance of plaintiff, gave charge No 3, as follows: "If the dynamite causing the plaintiff's injury, was carelessly and negligently left buried by the defendant, or its servants or agents in the discharge of their duty, before the plaintiff was employed by the defendant, and the plaintiff could not by the use of ordinary care and diligence, or precaution, have discovered the danger, then I charge you, that the defendant is liable in this action, and your verdict should be for the plaintiff for such amount as you believe from the evidence he was damaged, not exceeding \$8,000." (The complainant claims \$8,000 damages.) To this charge the defendant excepted.

It will be observed that the hypothesis of this charge is, that the dynamite had been "carelessly and negligently left buried by the defendant, or its servants or agents in the discharge of their duty." To be actionable under that part of the statute which controls this

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case—Code, § 2590, sub-section 2—the injury must be caused by the negligence of some person in the service or employment of the master or employer, “who has superintendence entrusted to him, while in the exercise of such superintendence.” To hold the master or employer liable under this provision, the negligence must be that of some agent or employé, who is in the exercise of superintendence, and to whose negligence in such exercise the disaster is traced. To hold otherwise would be to fasten liability on the principal to the employé for that which is at most the negligence of a fellow servant, having no greater power or authority than the servant who complains of the injury. This the statute does not authorize.—*Cook v. Parham*, 24 Ala. 21; *M. & M. Ry. Co. v. Smith*, 59 Ala. 245; *Smoot v. M. & M. Ry. Co.*, 67 Ala. 13; *Holland v. Tenn. C. I & R. R. Co.*, 91 Ala. 444; 8 So. Rep. 524; *Ga. Pac. R. R. Co. v. Davis*, 92 Ala. 300, 9 So. Rep. 252.

The principles declared in *Campbell v. City Council*, 53 Ala. 530; *City of Eufaula v. McNab*, 67 Ala. 588; *City of Montgomery v. Wright*, 72 Ala. 411, and 2 Dil. Mun. Corp., (4th Ed.), §§ 968 *et seq.*, relate to the duties and functions, properly so called, which municipal corporations owe to the public, and must perform for its well being. They are entirely unlike those presented by this record. This case presents only the relation of the employer and employé, and must be determined on the principles which pertain to that relation.

Recurring to the first and second counts of the complaint, it may not be improper to remark that the record contains no testimony that Howard was incompetent for duties assigned him, nor that the city authorities had notice or knowledge that the dynamite cartridge was buried or imbedded in the gravel bank, at which plaintiff was put to labor.

For the single error pointed out above, the judgment of the circuit court must be reversed.

Reversed and remanded.

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Statutory Action of Ejectment.

1. *Ejectment; fatal variance between complaint and evidence in description of land.*—When in an action of ejectment the plaintiff sues in his complaint to recover “41 acres of land off of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 2, township 11, range 19;” and the proof shows that on the trial the plaintiff asserted title to “41 acres off of the north and west sides of the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 2, township 11, range 19,” there is a fatal variance between the averment and proof, which precludes a recovery by the plaintiff.

2. *Exception in deed of uncertain parts of the property conveyed does not avoid a conveyance.*—When in a conveyance, complete and perfect in itself, of lands well identified and described there is embodied an exception from the grant of an uncertain and undefinable part of the property conveyed, the exception is void for uncertainty, but the grant itself is good.

3. *Same.*—An exception in a mortgage of “41 acres off of the north and west sides of the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 2, township 11, range 19,” being itself undefinable, is void for uncertainty.

APPEAL from the Circuit Court of Pike.

Tried before the Hon. JOHN R. TYSON.

This was a statutory action of ejectment brought by the appellee, J. C. Giddens, against Josiah Morris & Co. to recover the possession of certain lands.

The description of the lands sued for, as contained in the complaint, is set forth in the opinion. The title of the plaintiff to the land sued for is based on his adverse possession of the same for more than ten years. The defendants, Josiah Morris & Co., who were by motion made defendants instead of their tenant, against whom the suit was originally brought, claimed under a deed from one Bolling; and Bolling's title and claim to the property in controversy was derived from a mortgage, which was executed by plaintiff, J. C. Giddens, to R. E. Bolling, conveying to the latter certain described property. It was shown by the evidence of plaintiff that in this mortgage, which he executed to Bolling for the purpose of securing the payment of a debt to said Bolling, he conveyed his Briar Hill Place in Pike county; that a

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portion of the lands conveyed in said mortgage was described as follows: "The N. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ (less 41 acres off the north and west side) of section 2, township 11, range 19;" and that the lands sued for in the present action are the 41 acres so excepted in said mortgage. The deed from Bolling to defendants only conveyed the lands described in the mortgage.

Upon the introduction of all the evidence, the court, at the request of the plaintiff, instructed the jury that, "If they believe the evidence, they must find for the plaintiff;" and to the giving of this charge the defendant duly excepted. All the other facts are sufficiently stated in the opinion. There was judgment for plaintiff. Defendants appeal, and assign as error the giving of the affirmative charge for plaintiff, and the ruling of the trial court upon the evidence, which the opinion renders unnecessary to state in detail.

E. P. MORRISETT, for appellant. The exception in the mortgage from the plaintiff to Bolling was void for uncertainty, and the mortgage conveyed the whole 80 acres.—*Frank v. Myers*, 97 Ala. 437, 11 So. Rep. 832; *Alexander v. Wheeler*, 78 Ala. 167; 18 Wis. Rep. 447; 1 Greenl. Ev., § 300, pp. 303-4.

R. L. HARMON, *contra*.

McCLELLAN, J.—This is a statutory action in the nature of ejectment. The complaint seeks the recovery of "forty-one (41) acres of land off of the northwest quarter of the southwest quarter of section 2, township 11, range 19, lying and being situated in Pike county, Alabama." The judgment follows the complaint, being that "plaintiff have and recover of the defendant the following described lands, to-wit: forty-one acres off of the N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 2, township 11, range 19, lying and being situated in Pike county, Alabama."

On the trial there was evidence offered by the plaintiff himself which tended to show that the land of which he had been in the adverse possession, through which he derived the title relied on in the action, was "forty-one (41) acres off of the north and west side of the north half of southwest quarter of section 2, township 11, range 19, in Pike county." The jury might have be-

lieved this evidence; they had a right to do so. If they had found that the only title shown by plaintiff by adverse possession or otherwise was of forty-one acres off the N. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ section 2, township 11, range 19, their verdict should have been for the defendant. Forty-one acres off the N. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 2, &c., whatever it may be, is certainly not the same as forty-one acres off of N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 2, &c. The latter description would have reference alone to a certain sixteenth of a section, and no land beyond that is embraced. The former has reference to a certain eighth of a section embracing the sixteenth named in the complaint and judgment and also another sixteenth lying immediately east. The complaint calls in reality for all of the N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, and no more even though that contains only forty acres. The evidence to which we have adverted called for a strip of land of uncertain and unascertainable width extending along the north side of the N. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ —embracing of course a part of the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ —and along the west side of said half-quarter section—embracing a part and only a part of the N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$. There was, therefore, upon this evidence, which the jury were authorized to believe, and which indeed does not appear to have been controverted, a fatal variance between the averment and the proof. The claim was of the whole of a certain sixteenth of a section and no more. The evidence tended at least to show that the only title plaintiff had, or attempted to assert, pertained to an undefinable and uncertain part of a certain one-eighth of a section, embracing some part and only a part of the N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ sued for, and some part and only a part of the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, which is not sued for. On this state of case it was error to direct the jury to return a verdict for plaintiff, if they believed the evidence. Leaving out of view the uncertainty of the description of the land which plaintiff really claimed as shown by the evidence, the effect of this charge was to make the jury find for plaintiff in respect of the land sued for and all the land described in the complaint, though they might well have concluded from the evidence that plaintiff had no claim whatever to a large part of the land so described and sued for.

This conclusion will operate a reversal of the case.

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We need not pass upon the other assignments of error further than may be involved in the expression of our opinion that the attempted exception of "forty-one acres off of the north and west side of the N. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 2, township 11, range 19," in the mortgage executed by Giddens to Morris & Co.'s vendor, Bolling, is void for uncertainty, and of consequence the whole of the north half of said quarter section passed by that instrument.—*Frank v. Myers*, 97 Ala. 437, 11 So. Rep. 852.

Reversed and remanded.

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Action upon a Contract of Hire.

1. *Contract of hiring; right of employer when satisfaction guaranteed.*—A contract of hiring by which the employé "guarantees to give satisfaction," invests the employer with full power to determine whether the labor performed is satisfactory, and the reasonableness of the grounds of dissatisfaction can not be inquired into by a court in an action brought by the employé for the wages which would have accrued under said contract subsequent to his discharge.

APPEAL from the City Court of Montgomery.

Tried before the Hon. THOMAS M. ARRINGTON.

This action was brought by Osborn Allen, the appellant, against the Mutual Compress Company; and counted on a contract, which had been entered into by the plaintiff and the defendant.

The plaintiff was employed by the defendant under a written contract, which, among other provisions, contained the provision which is copied in the opinion, by which the plaintiff guaranteed satisfaction to his employer. After working a while the defendant paid the plaintiff in full for the time of actual service, and discharged him on the ground as stated—that he did not give satisfaction. The present suit is for the instalments of wages, which would have accrued subsequent to the discharge of the plaintiff by the defendant, and which were claimed on the contention that the said discharge was wrongful. The defendant set up as a defense, by

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special plea that under the said contract it had the right to discharge the plaintiff if his services were not satisfactory, and as it was not satisfied with the services of the plaintiff it discharged him. The other facts of the case are sufficiently stated in the opinion. Upon the introduction of all the evidence the court, at the request of the defendant, instructed the jury as follows: "If the jury believe the evidence, they must find for the defendant." The plaintiff duly excepted to the giving of this charge, and also duly excepted to the court's refusal to give the charges requested by him. There were several rulings of the court upon the evidence, but the opinion renders it unnecessary to notice them in detail. There was judgment for defendant, and plaintiff appeals.

RICHARDSON & REESE, for appellant.

BRICKELL, SEMPLE & GUNTER, *contra*.—The weight of authority holds that it is the province of the employer to determine whether the services of his employé are satisfactory, when under a contract of employment the servant guarantees to give satisfaction.—*Bash v. Bash*, 9 Pa. St. Rep. 260; 2 Parsons on Contr., 15; *Cline v. Libby*, 32 Am. Rep. 700; *Gibson v. Cranage*, 33 Am. Rep. 351; and authorities in note; *Johnson v. Bindseil*, 8 N. Y. Supplement 485; *Tyler v. Ames*, 6 Lansing 280; *McCarren v. McNulty*, 7 Gray. 139.

COLEMAN, J.—The questions presented in the record for consideration arise from the construction of a provision in a written contract of employment. The defendant employed the plaintiff for a period of five months, at two dollars per day, to sew and tie cotton bales for the compress. After serving a little over one month, the defendant paid the plaintiff for the time of service rendered, and discharged him, claiming that under the contract it had the right to discharge the defendant whenever it became dissatisfied with the services of the defendant, and that it was the sole judge of the sufficiency of the cause. The provision of the contract under which this right is claimed is as follows: "We guarantee to give satisfaction in sewing and tying, or any other work that we may be required to do." The defense to the complaint was that plaintiff failed to give satisfaction.

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The authorities are not altogether harmonious. In some it is held that a stipulation of similar import in a contract arms the party, for whose benefit it was made, with unquestioned authority to consult only his own judgment, will or feelings, and the reasonableness of the grounds of dissatisfaction is not a matter of enquiry. *Cline v. Libby*, 32 Amer. Rep. 700; *Gibson v. Cranage*, 33 Amer. Rep. 351, and authorities cited in note; *McCarren v. McNulty*, 7 Gray 139; *Tyler v. Ames*, 6 Lansing 280. On the other hand, there are authorities which hold that an employer can not dismiss his servant without actual cause.—*Jones v. Graham*, 16 N. W. Rep. 893; *Dagget v. Johnson*, 49 Vt 345. The latter case grew out of a purchase of milk pans, and the stipulation was that the purchaser was to pay for them "if satisfied with the pans." The supreme court held "that the defendant had no right to say without cause that he was dissatisfied and would not pay for the pans, * * that the dissatisfaction must be actual, not feigned, real, not merely pretended."

It seems to us the latter authorities render nugatory an important provision in the contract. Exclude from the contract the provision, "satisfaction guaranteed," or "if satisfactory," and it is clear that "for cause," "actual cause," "good cause," the party would have the right to discharge the employé or reject the article. Parties make their own contracts, and either may stipulate as he may deem it necessary for his own protection, and it is optional whether the other accepts the terms proffered. Having once made the contract, neither can hold the other to a different contract. When, therefore, one guarantees to give satisfaction, he assumes the undertaking to perform the work in such manner as to satisfy the other, and invests the latter with full power to determine the reasonableness of the cause. We can not presume, the contract would have been made without such a provision or on any other terms. This was the construction placed upon the contract by the trial court, and we are of opinion it was correct.

Affirmed.

[Janney & Cheney, Trustees v. Habbeler.]

Janney & Cheney, Trustees v. Habbeler.

Bill in Equity to enforce a Vendor's Lien.

1. *Vendor's lien; enforcement against assignee of purchaser.*—A vendor who retains title to the land and has the right of possession, but binds himself to convey on payment of the purchase money, can maintain a suit to enforce his lien, which is in the nature of an equitable mortgage, against the purchaser's assignee in a general assignment for the benefit of creditors.

2. *Same; jurisdiction of the court.*—Where a vendor of lands, who retains title, but binds himself to convey upon payment of the purchase money, files a bill to enforce his lien against the assignee of the purchaser in the district court, having equitable jurisdiction in the county wherein the land is situated, a plea to the jurisdiction of said court, which avers the assumption of jurisdiction by a different chancery court of the administration of the trusts created by the purchaser's deed of assignment, and of all the property owned by the assignor, and decreeing that all persons asserting any rights, liens or charges affecting any of the property should prosecute the same in said chancery court, but which does not show that the complainant vendor was a party to said proceedings and had opportunity to be heard, is insufficient as a bar to the exercise of the jurisdiction of the district court in the enforcement of the vendor's rights.

APPEAL from the District Court of Colbert.

Heard before the Hon. W. P. CHITWOOD.

The facts of the case are sufficiently stated in the opinion.

TOMPKINS & TROY and HORACE STRINGFELLOW, for appellants, cited *Gay, Hardie & Co. v. Brierfield Coal & Iron Co.*, 94 Ala. 303, 11 So. Rep. 353; *Barton v. Barbour*, 104 U. S. 134.

WILHOYTE & HARRIS, *contra*.

HEAD, J.—On the 4th day of December, 1886, the appellee, Habbeler, entered into a written contract with Alfred H. Moses by which he agreed to sell to Moses the lands described in the bill, situate in Colbert county,

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Alabama, at the price of twelve thousand dollars, the payment of the greater portion of which was deferred to specified times for maturity; and it was agreed that Habbeler would convey the land by deed to Moses, or to him and such others as he might direct, or to a company he contemplated forming if so directed by him, and Moses agreed that, upon delivery of the deed, he would deliver to Habbeler the notes of the grantee or grantees, for the deferred payments secured by a mortgage on the premises. Divers payments were afterwards made upon the demand for the purchase money, until the indebtedness was reduced, at the time of the filing of the bill, to \$5,884.23. This balance being unpaid, Habbeler filed this bill on the 21st day of July, 1892, in the district court of Colbert county, sitting in equity, to enforce his lien as a vendor upon the lands. It is not made to appear by express averment whether the deed and notes and mortgage were ever executed or not, but as the bill is framed it must be taken that they were not. The transaction must then be regarded as one of a vendor of lands retaining the title and binding himself to convey upon payment of the purchase money, and there can be no question, upon the face of the bill, of his right to enforce, in a court of equity, his lien, which is in the nature of an equitable mortgage.

Sometime in 1891, Moses, becoming insolvent, executed to certain assignees a general assignment of his property and effects, including his rights under said contract of purchase, for the benefit of his creditors. The assignees afterwards resigned the trust, and the appellants, Janney and Cheney, were regularly appointed in their stead by the chancery court of Montgomery county. They accepted the appointment and assumed the trust, and, with Moses, are made defendants to this bill. In bar of the exercise of the jurisdiction of the district court, Janney and Cheney interposed a plea setting up said assignment, and averring that immediately thereafter the assignees took possession and assumed control of all the said property assigned for the purposes of the trust, and on the 11th day of July, 1891, filed their bill in the chancery court of Montgomery county, setting forth, among other things, that many of the creditors of Moses had attached a large portion of the property assigned, claiming the invalidity of the assignment, and that said at-

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tachment suits, unless enjoined, would constitute a cloud on their title, and subject the said trust to great expense and loss, and praying that said court would assume jurisdiction of said trust and protect them in the administration of the same; that on the 22d day of October, 1891, the said chancery court adjudged that complainants, said assignees, were entitled to have it take and assume jurisdiction of the trust, and that it did thereby assume the same, decreeing that said assignees should proceed in the further administration of the trust, under the direction in said deed of assignment given them, subject to the terms and directions of said decree and such other orders and decrees as had been, or might thereafter be, rendered in the cause; that the said decree provided that the defendants to the bill and all other persons were restrained from proceeding further with said attachments or proceedings affecting or to affect, in any way, any of the property included in said deed of assignment, and the defendants and all other persons were restrained and enjoined from instituting any proceedings affecting or to affect in any way any of the said property in any court other than said chancery court, and from prosecuting any such proceedings theretofore commenced; and said defendants and all other persons asserting or claiming any rights, liens or charges affecting any of said property, and all persons having any claim to any portion of the fund to be distributed under the assignment were ordered to prosecute and assert the same in the said chancery court. The plea further sets up the resignation of the original assignees and the appointment of Janney and Cheney in their stead, and avers that the said suit in chancery was, in January, 1892, revived in their names as complainants, and that on the 23d day of April, 1892, said court rendered a further decree in said cause, upon the pleadings and evidence therein, in which the assumption of its jurisdiction by the said decree of October 22, 1891, was confirmed and ratified, and said decree affirmed; and further ordering that the said former restraining order and injunction be made perpetual; that said suit is still pending and undisposed of, and said Janney and Cheney are still engaged in the administration of the trust. The district court held this plea insufficient and overruled the same, and that ruling is assigned as error.

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It is the established rule in this State that the assignee in a general assignment, like that in the present case, acquires only such estate, and such rights and powers in reference to it, as the assignor had and the terms of the deed confer. If the interest of the assignor in a given property be that of a mere equity, with the legal title and right of possession outstanding in another, the deed only confers that equity. The assignee acquires no right to the possession as against the legal holder, and if in possession, it would be his legal duty to surrender it to the owner on demand, or he could be coerced to do so by appropriate legal proceedings. As it would be wrongful in the assignor, at the time of assignment, to withhold from others the possession of property to which they were entitled, so also would it be wrongful in the assignee to do so, who occupies precisely the same relation to the property. In the case before us, Habbeler was the legal owner of the land in question and entitled to the possession. As vendor, he was also invested with the right, in equity to condemn the land to the payment of the purchase money, to the complete foreclosure of all equities of the vendee. Moses had no other or higher estate or interest than the mere right to pay the balance of the purchase money and obtain the title and right of possession. That right, and no other, he conferred upon his assignees. The assignees filed their bill in the chancery court of Montgomery county to obtain the direction and protection of that court in the administration of the trust, and specially to enjoin the invasion of their possession and rights of property by certain attaching creditors, and that court passed a decree assuming the jurisdiction invoked; and it is now contended that the *res* and entire ownership of any and all property which the assignees possessed themselves of, or in which Moses had any interest or estate whatever, passed, by virtue of that decree, into the possession and under the dominion and control of that court, freed from the authority of all other persons, without regard to the extent and nature of their claims, to assert their rights in any other forum. The proposition is that the assignees, though mere volunteers under Moses, and standing, in relation to property precisely where he stood, and who have no other or greater trusts or rights than the terms of the assignment itself confer, may of their own volition, in the absence

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of all other claimants, apply to a court of chancery and obtain action of that court enlarging their possessory interests beyond any such vested in them by the deed of their creation, and completely foreclosing the assertion of the demands of all other claimants, without regard to the extent or nature of those demands. In other words, although they acquired nothing, and the right to administer nothing, from the deed, (from which all they did acquire was derived,) save that which Moses had and gave, yet they are entitled to obtain from the court of chancery by virtue of a decree for which they voluntarily apply, an enlarged right of possession and administration, beyond the deed, and infringing the rights and remedies of others not parties to the proceeding. We are of opinion that a voluntary assignment can not lawfully be the means to such ends; and we are unwilling to construe the decree of the chancery court as intending more than an assumption of jurisdiction and control over such property, rights and interests as the assignees were invested with, and which, by the terms of the deed, they were authorized to administer as a trust. It could not have been intended to give them the power to possess and administer property, or rights of property, which did not belong to Moses, but to others, and to which, therefore, they acquired no shadow of right by the deed of assignment. If the decree in question goes to this extent it was in excess of the court's authority and jurisdiction, violative of the property rights of others and to it we can not accord our sanction. We think the legal title of Habbeler to the land, his right to possession, and to condemn it to the payment of the purchase money, as they existed at the time of the assignment, remained unaffected by that instrument, or by any action the assignees might have obtained at the hands of the court of chancery, based upon their title, in a proceeding to which Habbeler was not a party and had no opportunity to be heard.

The case is different from that of a receiver, who is an indifferent person, without title, appointed by the court to take possession of particular property pending the determination of its ownership or disposition by the court. Such a person is the mere officer or agent of the court, and the property in his custody is essentially in the possession and under the dominion of the court, and no

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other tribunal will exercise its jurisdiction to disturb that possession.

We are of opinion the ruling of the district court was right, and its decree is affirmed.

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Bill in Equity to redeem from a Mortgage.

1. *Building and loan association; forfeiture of borrower's stock.*—Where a building and loan association, duly incorporated under the laws of the State (Code, §§ 1553-1556), has, in the exercise of its charter powers, adopted by-laws providing for the forfeiture of the stock of a borrowing shareholder, if he fails for three months to pay the interest or premiums on his loan, or the regular monthly instalments due upon his stock, if a borrower, to secure a loan from such association, executes a mortgage on real estate and assigns his stock as collateral security, and stipulates that these by-laws should be a part of the loan contract, the said association has the right to declare forfeited the stock subscribed for by such borrower, upon default by him for three months or more in the payment of his dues; and upon such forfeiture the shareholder is not entitled to have the mortgage debt abated to the extent of the aggregate of the payments made by him on his stock subscription prior to his default.

APPEAL from the City Court of Anniston, in Equity.

Heard before the Hon. JAMES W. LAPSLEY.

The original bill in this case was filed by the Anniston Loan & Trust Company against the Southern Building & Loan Association, Isaac Linsky, and O. H. Parker, as assignee of Isaac Linsky; and sought to redeem from a mortgage which had been given by I. Linsky to the Southern Building & Loan Association.

The defendant, the Southern Building & Loan Association, is a building and loan association organized under the laws of the State of Alabama in accordance with the provisions of sections 1553 to 1556, inclusive, of the Code of 1886. Isaac Linsky became a member of said association in accordance with its charter and by-laws, for the purpose of securing a loan of two thousand dollars which

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he subsequently negotiated, and, in addition to transferring his shares of stock in said association as collateral security, executed a mortgage upon a three-story brick building in the city of Anniston, to secure the repayment of the loan. Afterwards said Isaac Linsky executed a second mortgage upon the same brick building to the Anniston Loan & Trust Company to secure an indebtedness of twenty-five hundred dollars. Said Isaac Linsky continued to meet the instalments of interest, premiums and payments upon his subscription to the stock of said association until October 1, 1891, at which time these several payments aggregated a large amount. He afterwards failed in business, and made an assignment for the benefit of his creditors to O. H. Parker, as assignee.

The junior mortgagee, the Anniston Loan & Trust Company, offered to pay to the Southern Building & Loan Association, the senior mortgagee, the amount of Linsky's mortgage indebtedness, after deducting therefrom the aggregate of the payments made by said Isaac Linsky on the stock subscribed for and held by him; but this offer was refused. Said O. H. Parker, as assignee of said Isaac Linsky, made a similar offer to said association, which was in like manner refused. The Anniston Loan & Trust Company, the junior mortgagee, then filed the present bill in the city court of Anniston on September 21, 1892, against said Southern Building & Loan Association, O. H. Parker, assignee, and Isaac Linsky, and prayed to be allowed to redeem from said mortgage held by said association, offering to pay whatever amount is ascertained to be due thereon, and for the foreclosure of complainant's mortgage. O. H. Parker, as assignee, filed his cross bill on May 25, 1893, against the Anniston Loan & Trust Company, the Southern Building & Loan Association, and Isaac Linsky, in which he averred the assignment of said Linsky to him for the benefit of his creditors, his offer to redeem from the said building and loan association, which was refused; and prayed that he be allowed to redeem from the mortgage to the said association, by paying the amount ascertained to be due thereon by an accounting, and also to redeem from the mortgage to the said Anniston Loan & Trust Company, by paying such amount as was ascertained to be due to it.

The cause was submitted upon an agreed statement of facts, the substance of which is sufficiently stated above and in the opinion of the court. Upon the final submission the court decreed that the complainant in the cross bill, O. H. Parker, as assignee, be entitled to redeem upon payment of the amount declared in said decree to be due the Southern Building & Loan Association and the Anniston Loan & Trust Company, upon their respective mortgages, within five days from the date of the decree; and that upon the failure of the said O. H. Parker to redeem within the time specified that the Anniston Loan & Trust Company, the complainant in the original bill, be entitled to redeem; the amount to be paid in each instance to the Southern Building & Loan Association, being the amount of the mortgage debt after giving credit for the payments made by said Linsky upon his stock subscribed.

The Southern Building & Loan Association prosecute the present appeal, and assign as error this final decree.

LAWRENCE COOPER and A. P. AGEE, for appellant.—

(1.) Linsky and the association could enter into the contract providing for the forfeiture of his shares of stock upon his making default for more than three months in the payment of his instalments, interest and premiums. § 1556, sub-div. 6, Code of Ala.; *Freeman v. Building Asso.*, 114 Ill. 182; *Williams v. Glover*, 66 Ala. 189; *Mobile B. & L. Asso. v. Robertson*, 65 Ala. 386; *Endlich on Building Asso.*, § 278. (2.) A by-law providing for such a forfeiture is binding on him and his assignee after he has assented to the same and made it a part of his contract with the association. (3.) If such by-law was binding on him, then a second mortgagee could have no more rights as to a redemption than the mortgagor himself would have if he desired to pay off the mortgage indebtedness. (4.) The forfeiture of the stock was authorized by statute, by the by-laws, and by contract, and the city court should have decreed that the Anniston Loan & Trust Co. or O. H. Parker, assignee, in order to redeem; should pay to the association the sum of \$2,000 together with interest at the legal rate from the default in payment of interest and premium to the time of the decree in the city court.—§ 1556 sub-div. 4, 6 and 12 of the Code of Ala.; *Endlich on Building Associations*, §§

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9, 127, 180; *Freeman v. Building Asso.*, 114 Ill. 182; 2 Story's Eq. Jur., §§ 1325-1326; 2 Pomeroy's Eq. Jur., §§ 457-458; *Kelly v. B. & L. Asso.*, 64 Ala. 503. (5.) If said Linksy and the association could not enter into the contract into which they did enter providing for the forfeiture, then the court should declare the stock not forfeited, and decree that the said association sell the said stock, deposited as collateral, to the highest bidder, and apply the proceeds to the mortgage indebtedness to the association, and look to the real estate security for the remainder of such indebtedness, or allow the second mortgagee to redeem from the association by paying the balance due after applying the proceeds from the stock. Endlich on Building Asso., § 460; *Red Bank Asso. v. Patterson*, 3 C. E. Gr. (N. J.) 223; *Reilly v. Mayor*, 1 Beas. (N. J.) 55; *Washington v. Beaghen*, 27 N. J. Eq. 99; *Massey v. B. Asso.*, 22 Kas. 638. (6.) If the second mortgagee or O. H. Parker, assignee, were entitled to any credit whatever for the amount paid by Linksy on his instalments, it could have been no more than the amount paid into the loan fund, and not the amount paid into the expense fund. All members must contribute *pro rata* to the expenses of the association.—Endlich on Building Asso., §§ 99, 105; *McGrath v. Hamilton Sav. & Loan. Asso.*, 44 Pa. St. 383; *Patterson v. Albany B. & L. Asso.*, 63 Ga. 373. (7.) The association should have been allowed interest to the time of the decree and not merely to the time of the filing of the bill. There was no legal tender.—Code of Ala., § 2685; *Parks v. Wiley*, 67 Ala. 310; *Alexander v. Caldwell*, 61 Ala. 543; *Caldwell v. Smith*, 77 Ala. 157.

KNOX, BOWIE & PELHAM, *contra*.—A forfeiture on the part of the borrower does not mean a forfeiture of the payments made by him on account of the subscription to the stock, or the instalments upon the loans secured to the company.—Endlich on Building Asso., §§ 99, 127, 165; *Robertson v. Homestead Asso.*, 69 Amer. Dec. 162. It is of little consequence what form the transaction has assumed, whether the borrowing shareholder be regarded as having made his payments directly upon his loan, or upon subscriptions to shares of stock in the company which he received and subscribed for in order to qualify him to make the loan. When he makes default he is

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entitled, as a matter of right, to be credited with the value of his stock, or the aggregate amount of payments made by him on account of the stock or loan, as the case may be. This, we understand, to be the rule in this State, as well as other States.—*Mobile B. & L. Asso. v. Robertson*, 65 Ala. 382; *Falls v. United States B. Co.*, 97 Ala. 417, 13 So. Rep. 25; *Robertson v. Homestead Asso.*, 69 Amer. Dec. 162; Endlich on Building Asso., 453; 2 Amer. & Eng. Encyc. of Law, 639.

HARALSON, J.—The main question in this case, as stated by the appellant, is the right and power of the Southern Building and Loan Association to declare forfeited the shares of a borrowing member. Or, as stated by counsel for appellees, “The cause was submitted in the court below upon an agreed state of facts, and the single point of dispute turns upon the question of the right of the Southern Building and Loan Association to forfeit the shares of stock held by it as collateral, and the refusal of said association to credit its mortgage with the value of the stock, or the aggregate amount of the payments made by Isaac Linsky on account of said stock, or on account of said loan. There is no dispute as to what payments were made, but the Southern Building and Loan Association plants itself upon the proposition, that it is entitled to recover the full amount of the original loan with interest, without any abatement for the value of the stock, or the aggregate amount of payments made by Isaac Linsky during the life of the loan. The learned court below held that this construction was inequitable and not within the contemplation of the parties at the time the contract was made, and that the junior mortgagee and the assignee for the benefit of creditors were entitled to redeem upon paying the amount of the mortgage loan, after deducting the value of the stock, or the aggregate amount of the payments made by said Isaac Linsky prior to making default.” We thus have the issue plainly and sharply defined, and the parties treat the value of the stock, as merely the aggregate of all the payments which have been made upon it, thus following the rule which is laid down in the books for the ascertainment of its value—Endlich on Building Asso., §§ 455, 457, and authorities there cited.

This question has given rise to some confusion in the Vol. 101.

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decisions of courts. In North Carolina, the transaction has been treated upon the basis of an actual loan of money, and the aggregate amount of payments upon stock as partial payments on the loan by the borrower. *Overby v. The Fayetteville B. & L. Asso.*, 81 N. C. 56; *Hoskins v. Mich. B. & L. Asso.*, 84 N. C. 838. And the earlier Pennsylvania cases, previously to that of the *North Am. Building Asso. v. Sutton*, 35 Pa. St. 463, maintain the same view of the question. Commenting upon these decisions, Mr. Endlich says that the Supreme Court of Pennsylvania, in *Sutton's case*, *supra*, for the first time approached an understanding of the nature and dealings between the building association and its members; that under the rulings in the former cases in that court, upon the theory of partial payments, it followed that each stock payment made by the borrowing member was a *pro tanto* reduction of his mortgage debt, to be deducted with interest from the date of payment; and he adds: "The fallacy of this doctrine is obvious from the fact that the borrower's standing as a member is not merged in his superadded character of debtor, and that, as a member, he is not entitled to an account of profits made by the society upon his contributions, before the period of its termination (or that of the series to which his stock belongs), whilst the settlement of his liabilities as a borrower is also referred to the winding up of the mutual scheme. It has therefore, become a well recognized doctrine that payments of dues upon stock are not payments to the mortgage debt, and do not, *ipso facto*, work an extinguishment of so much of the mortgage. The fact that the borrower has assigned his shares to the society as collateral security for his debt makes no difference; for this is a recognition of the distinct standing of the member as a member and as a debtor."—Endlich on Building Associations, § 452. And it is a correct principle, as has been held, that there is no connection established between the stock held by the stockholder and the bond held by the company, such as that payments made on stock are to be treated as payments on the bond, so that one is steadily offset against the other, or the one merges in the other,—a fallacy sometimes indulged, arising from a failure to observe the separate existence of the stock on the one hand and the bond on the other,—the separate

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relation borne to the company, on the one side, by its stockholder, and, on the other, by its borrower. The payment on the one is not necessarily a payment on the other.—*State Washington Bldg. & Loan Asso. v. Hornbacker*, 42 N. J. L. 635; *Endlich Building Asso.*, § 452. Mr. Freeman, in an extended note to *Robertson v. Homestead Association*, 69 Am. Dec. 163, gives approval to the same principle, citing a long list of cases in support thereof; and the learned annotator adds, as a conclusion from the very many authorities he cites, as to the amount that the borrower ought justly to pay when he wishes to withdraw, or is in default, and his mortgage is sought to be enforced, that, "It must be remembered, that when a member obtains a loan or advance, he anticipates the amount he is to receive upon the termination of the association, or of the series to which it belongs. His obligation does not look to a repayment before that time. If he desires to withdraw, or it becomes necessary to enforce his mortgage against him before that period arrives, the question is, what amount ought he equitably to pay? In ascertaining this amount, the only difference between the two cases seem to be, that when he voluntarily withdraws he is entitled to receive the *bonus* or share of profits allowed him under the laws of the associations, and when he is in default, no such allowance is to be made him." The justness of this conclusion is vindicated on the ground that the defaulting member's action is an injury to the association, arising out of a breach of his obligations, for if he continue from time to time, for purposes of his own convenience, to withhold his contributions to the common fund, when they become payable, it is clear he is thereby depriving the association of just that much money, which ought to be invested for the common good; and if this be allowed till the end, it is also plain he will have derived, from his own violation of duty, an unjust advantage, in sharing with the other members, notwithstanding his defaults, an equal participation in the profits.

In principle there can be no difference in the rule as to the prompt payment of premiums on a policy in a life insurance company, and the premiums and other dues on a building and loan contract, and this court, speaking of the former, said: "It is too late, at this

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day, to raise any question as to the legal validity of such a contract. To one who understands anything of the principles upon which the business of life insurance is conducted, it is obvious that the punctual payment of premiums is of the very essence of the contract. The calculations of insurance actuaries, fixing the rates of insurance, are based on the theory of prompt payment, so as to afford opportunity for such re-investment as to reap the fruits of compound interest upon the company's moneyed capital. Laxity in the enforcement of punctual payments might, and no doubt would, frequently lead to ultimate, if not speedy, financial ruin. Stipulations, therefore, incorporated in insurance policies, making such payments conditions precedent to the continued liability of the insurer, are generally maintained as valid by the courts.'—*Ala. Gold Life Ins. Co. v. Thomas*, 74 Ala. 582. Forfeitures for the non-payment of premiums is a necessary means, for insurance or building and loan companies, of protecting themselves from embarrassment, and delinquency can not be allowed except at the option of the companies.—*Ins. Co. v. Statham*, 93 U. S. 24; *Klein v. Ins. Co.*, 104 U. S. 88. In keeping with this doctrine, Mr. Pomeroy lays it down, that a forfeiture of shares of stock in a corporation, duly incurred by the stockholders, for failure to pay the calls or instalments thereon, as provided by the charter or by-laws of the company, will not be set aside or relieved against by a court of equity.—1 Pom. Eq. Jur., §§ 457, 458; 2 Story Eq. Jur., §§ 1325, 1326.

With these principles in view, let us enquire into the particulars of the case we have before us. This association was chartered under the provisions of the Code, Part 2, Tit. 1, Ch. 4. Section 1556 confers upon Building & Loan Associations, chartered thereunder, the power, (4.) "To make all needful rules and regulations and by-laws, for the transaction of its business, and the management and control of its affairs;" (6.) "To compel payment and compliance with all lawful orders, by fines and forfeitures;" and (12.) "To secure the payment of instalments and loans, and a compliance with all the terms on which loans are purchased, by mortgages with power of sale on real estate, and the same to foreclose on default," &c.

The Association adopted a code of by-laws clearly

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within the statutory powers conferred, by which it was provided, among other things, that the certificate, terms and conditions of the shares of the association and the by-laws form the contract with the shareholder; that persons desiring to become shareholders must make application according to forms provided for that purpose, the application forming a part and parcel of the applicant's contract with the association, (and in these applications there is an agreement by the applicant, that he will comply with all the rules and regulations of the association); that all loans must be secured by note and first mortgage on real estate, the borrower to pay interest and a premium, *at the rate of five per cent. per annum, each*, the same to be paid on or before the 5th day of each month during the continuance of the loan; that all shareholders are to pay a monthly instalment, each, of 35c. on each share (of \$50) named in the certificate, on or before the 5th of each month, without notice, five cents of which shall be placed to the expense account; that members in good standing may withdraw the amount paid by them, in monthly instalments of shares, into the loan fund, together with interest at the rate of *six per cent. per annum*, after giving sixty days notice in writing, such notice to be given after the expiration of two years; that, if any shareholder shall neglect to pay the interest or premium on his loan, or his regular monthly instalments or other fees, for three months, or in any way fails to comply with his contract, the association may compel payment of principal and interest and premiums, fines and dues by proceeding on his note, and foreclosing the mortgage or other security, which shall at once become due and payable, *and the association may cancel and treat as forfeited the said shareholder's shares, whether deposited as collateral security or not, and all payments made thereon shall be forfeited to the association*; and that time, punctuality and strict performance on the part of all shareholders, in the payment of premiums, fines, instalments, interest and loans, is made the essence of the contract.

Linsky signed his applications for the loan he received, and in them he agreed, "I will also comply with all the rules and regulations of the association." They were approved, and under them he received a loan from the association for \$2,000, on the 16th June, 1890, for

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which he executed and delivered his note or bond, payable six years after date, with interest thereon, and the premiums bid in his applications, and payable according to the by-laws, and assigning in said note as collateral security to the association for the sum loaned to him, and for the payment of the monthly instalments required of him, his 40 shares of stock in the association. In the conclusion of the note is the provision: "And it is stipulated, that in the event I make default in the payment of said instalments, interest, premiums or fines to said association, for a period of three months, then this bond shall mature and become payable, and I hereby authorize said association to cancel my said shares, and the same shall be thereby forfeited." At the same time, he executed the mortgage, a copy of which is attached to the answer of the association, conditioned that, "If the said Isaac Linsky shall well and truly pay said sum of \$2,000, as evidenced by said note, at the maturity thereof, * * and shall also promptly [pay], on the 5th day of each month, the instalments due on his shares, until the amount in the loan fund to the credit of his shares, from monthly payments and profits, equals fifty dollars for each share on which said loan is made, and shall also promptly pay the monthly interest on said loan, and the premiums so bid by him, monthly, and shall comply with the laws of said association, then this conveyance shall be null and void, otherwise, to remain in full force and effect," subject to foreclosure as provided therein. On the 15th day of September, 1892, said Linsky having made default in the payment of the instalments on his stock, interest, premium and fines for more than three months, and never having filed an application for the withdrawal of his shares of stock, after he had been paying thereon two years, or at any other time, the association, by resolution duly adopted, declared the said forty shares of stock of said Linsky forfeited to the remaining stockholders of said association, and the same was passed to the credit of the loan fund of the association.

From what has been said, it appears, then, that the association was duly organized, under a charter obtained under the general law of the State for that purpose; that the statute under which it was organized authorized it to make all needful by-laws for the transac-

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tion of its business, and to compel payment and compliance with the by-laws, by fines and forfeitures; that the association adopted by-laws which provided for the forfeiture of the stock of its shareholders, if they failed for three months to pay the stipulated contributions to the association, as provided by the by-laws and the contract of the borrower; that Linsky agreed to abide these rules and regulations, and agreed that they should be a part of his contract of loan; that he executed his note and mortgage, and agreed therein that, if he failed to comply with the terms of his contract, his stock should be forfeited to the association; that he did make default, and that the association, in accordance with its by-laws, declared his stock forfeited. The policy of the law favored the forfeiture, the statute authorized it, the rules of the association and the contract of the parties provided for it, and the association declared it, in accordance with the terms of the contract and by-laws. We find thus erected, against our declaring this forfeiture unconscionable and inequitable, as we are asked to do in this bill, a barrier so high we are unable to surmount it.

The appellant is entitled to the full amount of its said loan, principle and interest, according to the terms of the contract, from the time said Linsky ceased to pay the same thereon, without any abatement for the value of the stock forfeited, and if the same is not promptly paid, in redemption of its said mortgage by the complainant in the cross bill, or by the complainant in the original bill,—the complainant having submitted itself to the authority of the court to that end,—it is entitled to a decree of foreclosure of its said mortgage, and to a sale of the real property therein described, for the payment of its said debt and interest.

The complainant in the cross bill is entitled to redeem from the mortgages of the appellant and of the Anniston Loan & Trust Company, by paying the amounts that may be ascertained to be due thereon, respectively, within a short time to be specified by the court; and, in default of such redemption by him, then, the complainant in the original bill, the Anniston Loan & Trust Company, is entitled to redeem from the mortgage of the defendant, the Southern Building & Loan Association, by paying the full amount due thereon, principal and in-

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terest, without abatement for alleged payments thereon, and in that case, to the decree of the court foreclosing its own mortgage, and that of said association, so redeemed by it, and to a sale of the real estate in said mortgages mentioned for the payment of its own debt and that of said association which it has paid.

The decree of the court below is reversed, and the cause remanded for further proceedings in conformity with the above directions.

Reversed and remanded.

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Contest of Election.

1. *When rulings by judge of probate in election contest not reviewed on appeal.*—Under the statutory provision, that "In contested election cases tried by the judge of probate, an appeal lies to the circuit court, to be tried *de novo*," (Code, § 432), rulings made by the judge of probate in contest proceedings instituted before him, even though erroneous, which were not carried into the rulings of the circuit court on appeal from the probate court, will not be reviewed by the supreme court.

2. *When remedial statute goes into operation.*—A statute to provide for and regulate contests of elections, being remedial in its character, and not prescribing punishments or penalties, becomes operative and is of force during the entire day on which it was approved; the law in reference thereto not regarding a fraction of a day.

3. *When statute repealed by later statute.*—When a statute to provide for and regulate contests of elections expressed the intention and attempt to repeal, by numbers, every section of the Code providing for and regulating contests of elections, and is not a re-enactment of the sections attempted to be repealed, but is the enactment of a new statute, with substantially different provisions, the said sections of the Code are repealed and destroyed by the later statute.

4. *Effect of repealing statute upon pending contest.*—The repeal of a statute upon the very day judgment is rendered in a proceeding commenced under its provisions puts an end to such suit.

5. *Same.*—Where, on the very day a judgment is rendered in a contest of election proceedings, instituted under the several sections of the Code providing therefor, the Governor approved an act to provide for and regulate contests of elections, which repealed the sections of the Code under which the contest was instituted, the case falls

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within the influence of the later statute, and the repeal of the statutory provisions under which the proceedings were commenced puts an end to the contest.

APPEAL from the Circuit Court of Montgomery.

Tried before the HON. JOHN R. TYSON.

The facts of the case are sufficiently stated in the opinion.

RICHARDSON & REESE, for appellants.

JOHN GINDRAT WINTER, TOMPKINS & TROY, MARKS & MASSIE and LOMAX & LIGON, *contra*, cited *Young v. Pollak*, 85 Ala. 439, 5 So. Rep. 279; *Luke v. Calhoun County*, 56 Ala. 415; *Wood v. Fort*, 42 Ala. 641.

STONE, C. J.—This was and is a contest by Turnipseed, the appellant, of the election of Jones, appellee, to the office of treasurer of Montgomery county. The proceeding was instituted before the judge of probate under the statutory provisions found in the Code of 1886, commencing with section 396 of that Code. It is not shown in the record before us what disposition the judge of probate made of the case, nor in what manner it found its way into the circuit court. It comes to us by appeal from the judgment of the circuit court, pronounced on demurrer to contestant's amended complaint, which sets forth his grounds of contest. The ruling by the judge of probate becomes wholly immaterial; for under the statute as it existed when this proceeding was commenced—Code of 1886, § 432—"In contested election cases tried by the judge of probate, an appeal lies to the circuit court, to be tried *de novo*." So, no erroneous rulings made by the judge of probate, if such were made, not carried into the rulings of the circuit court can be inquired into in this court. The circuit court sustained the demurrer to the amended complaint, or information, and the present appeal questions the correctness of that ruling.

The judgment of the circuit court sustaining the demurrer was pronounced February 10, 1893. On that identical day the Governor approved the act "To provide for and regulate contests of elections to offices, State and county, herein named."—Sess. Acts 1892-93, p. 468.

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That statute embraces the office of county treasurer, and provides for its contest. It also expressly repeals by numbers all the sections of the Code under which the present contest was instituted. The questions arise, Does that statute exert any influence in the decision of this case? If so, what influence does it exert? It will not be denied that the right to contest an election is purely statutory, and when that mode of redress is invoked, statutory requirements must be substantially conformed to.

At what time must the statute of February 10, 1893, be understood as going into operation? The authorities bearing on this question are far from uniform. It was long the rule in England, the source of our common law, that sessions of parliament were treated as one continuous day, every statute enacted during any given session was binding and given effect to, as if enacted on the first day of the session. Under that absurd interpretation fines and mulcts were assessed for acts, which, when done, violated no law then in existence. This was subsequently changed by statute. But still the rule on this question in the several States is far from uniform. "In this country an act takes effect generally, and where no other time is fixed by constitution, general law, or the particular statute itself, from the time of its passage."—Endlich Interpretation of Statutes, § 498, note 119. Neither does the law, in the absence of express provision, regard a fraction of a day. "In the legal computation of time there are no fractions of a day; and a day on which an act is done must be entirely excluded or included."—5 Amer. & Eng. Encyc. of Law, p. 89. "The legislature has full power to take away by statute rights, not vested, which have been conferred by statute. If the repealing statute is general and unconditional, without a saving of pending proceedings and prosecutions, these fall with the statute which may have authorized them."—*Luke v. Calhoun County*, 56 Ala. 415.

The question we are considering has been settled in this State.—*Wood v. Fort*, 42 Ala. 641. In that case it was said: "The right of the appellee to an affirmance depends upon the question whether the act is to be deemed to have been of force during the entire day of its approval. Upon authority and principles of policy and convenience, carefully limiting ourselves by the necessities of this case, we decide that a public statute, reme-

dial in its character, and not prescribing punishments or penalties, is of force during the entire day of its approval, and that the law in reference thereto does not recognize any fraction of a day. Yet we concede that the decisions are not entirely harmonious." That doctrine was reaffirmed in *Young v. Pollak*, 85 Ala. 439, 5 So. Rep. 279. So, we must treat this case as falling within the influence of the act approved February 10, 1893.

This leads up to the inquiry, whether the act approved February 10, 1893—Sess. Acts, 468—repeals and destroys the sections of the Code under which the contest in this case was instituted. As we have said, the later enactment expresses the intention and attempt to repeal every section of the Code, by number, on which the contest in this case was inaugurated. It may be, however, that this is not conclusive of the inquiry. It may be, that when by one act of legislation a statute is attempted to be repealed, and by the same act it is re-enacted, this, without more, is not a repeal of the older statute, but simply a continuance of it in force. On this question we need not and do not decide anything.—Sutherland Stat. Cons., § 134, *et seq.*; *Ib.*, §§ 153–4. Nor do we intimate any opinion in this connection on the effect of article IV, section 2 of the Constitution of 1876, on statutory amendments coming within its provisions. The present case does not fall within either of those principles; first, because this was not a re-enactment of the statute attempted to be repealed, but the enactment of a new statute with substantially different provisions. The following are some of the most striking differences:

1. Instead of the four grounds of contest specified in the Code, section 396, the later statute expresses five grounds.
2. Under the former statute it was provided that, "In all contests of elections for the office of justice of the peace or constable, or for any office which is filled by the vote of a single county, except for members of the General Assembly, the person whose election is contested is entitled to a trial by jury, the issue to be made up under the direction of the court, and the jury summoned as in cases in the probate court."

The provision in the later enactment, relating to the trial of this class of contests, is in the following terms: Section 10. "That to contest any election for justice of the peace, or constable, or any election to any office

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filled by the vote of a single county, except as herein otherwise provided, * * * if the ground of contest of the election be malconduct, fraud, or corruption on the part of any inspector, clerk, or returning officer, or because of bribery or offers to bribe imputed to the party whose election is contested, such party may demand a trial of these grounds of contest by jury. All other grounds of contest may be determined by the judge of probate, without the intervention of a jury." The word *may*, in this last clause, means *must*, to give it any meaning whatever. *Tarver v. Commrs. Court*, 17 Ala. 527. In the Code of 1866, Section 432, is this provision: "In contested election cases tried by the judge of probate, an appeal lies to the circuit court, to be tried *de novo*." In the statute of February 10, 1893, section 14, is this language: "That in all contested elections before the judge of probate, an appeal lies to the circuit court or supreme court, within five days after the rendition of judgment. * * And if judgment be rendered confirming the judgment of the judge of probate, * * the supreme court must render judgment against the appellant and his securities for the cost." We might point out many other differences between the two statutes, but think the foregoing sufficient. The later enactment expressly mentions all the sections of the Code under which the present suit was instituted; and, as we have shown, repeals them.

In the second place, the statutory change effected in this case can, in no sense, be brought under the influence of article IV, section 2 of the Constitution. It neither revives nor amends any existing law, nor extends the provisions of any law, nor attempts to do so; and it makes no reference to any law by its title only. It enacts a new system on a subject on which an older statute had been in force, and repeals the older statute. We feel constrained to hold that the repeal was anterior to the trial of this case in the circuit court, and that it was in law and fact a repeal of the statute under which the proceeding was instituted. What effect must that repeal have upon the present suit?

The present is the contest of an election, a purely statutory remedy. Without statutory authority the remedy in the form invoked did not exist. It was framed in reference to the provisions of the Code, but before judgment the statute had ceased to exist. The

case of *New London Northern R. R. Co. v. B. & A. R. R. Co.*, 102 Mass. 386, was one of the best considered of all the cases bearing on this question, which has fallen under our observation. The opinion was by Gray, at present one of the justices of the Supreme Court of the United States, and he cites and gives the pith of many decisions which shed light on the inquiry. We quote: "The law does not indeed favor a repeal by implication. But a later statute, containing provisions though merely affirmative in form, plainly repugnant to those of a former statute, repeals it as absolutely as by a negative clause. Even the jurisdiction of a superior court may be ousted by necessary implication, as well as by express words. In *Surtees v. Ellison*, 9 B. & C. 750-2, Lord Tenderdon said: 'It has been long established, that when an act of parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed.'" To be properly appreciated, the entire opinion of Justice Gray must be read, together with the numerous authorities he collates.

In *Com. ex rel v. Commrs.*, 6 Pick. 501, it was decided that "where a special tribunal is created by an act of the legislature, on a repeal of the act, without any saving of proceedings commenced and pending before it, its whole power and authority cease, and it can not proceed to finish what may have been so commenced." In *Key v. Goodwin*, 4 Moore & Payne, 341, Lord Chief Justice Tindal said: "I take the effect of repealing a statute to be, to obliterate it as completely from the records of the Parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions or suits which were commenced, prosecuted and concluded whilst it was an existing law."

State v. King, 12 La. An. 593, carries the doctrine farther than the wants of this case require. In that case it was said by Spofford, C. J., "that the repeal of a penal statute pending a prosecution under it, without a saving clause, puts an end to the prosecution, although the penal statute may, *uno flatu* with the repeal, be substantially re-enacted." See also *Com. v. Kelliher*, 12 Allen, 480; *Coates v. Hill*, 41 Ark. 149; *Coffin v. Rich*, 45 Me. 507, 71 Amer. Dec. 559; *Pope v. Lewis*, 4 Ala. 487.

We hold that before this case was brought to a conclusion in the circuit court, the statute under which it was

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instituted was repealed, and that that repeal put an end to the suit.

The judgment of the circuit court is affirmed.

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Action of Trespass.

1. *Action of trespass; right of a co-tenant to maintain it.*—A tenant in common, owning with others a dwelling-house, one room of which is occupied by her exclusively, has a right to maintain trespass for the disturbance of her possession and occupancy of her room, not involving any injury to the room itself, without joining with her as parties plaintiffs her co-tenants.

2. *Trespass; entering room to remove personal effects.*—Where a house, which descended to children as tenants in common from their mother, was afterwards occupied by their father and his second wife with his family, the fact that after the death of the father his second wife remained in the house, and exercised control as the head of the family, did not give her, when about to move thence, the right to enter a room in said house, which had up to ~~that~~ time been occupied by one of the co-tenants, against the protest of the latter, to take therefrom some articles claimed by said wife; and for such wrongful disturbance of her possession of the room, the said co-tenant may maintain trespass.

3. *Same; effect of decree of probate court setting apart such articles as widow's exemption.*—In such an action of trespass for the wrongful disturbance of plaintiff's possession and occupancy of a bed-room, the fact that the articles claimed by the defendant and attempted to be taken from the room, had been set apart to her and a minor son of her late husband by his former marriage by a decree of the probate court as a part of their exempt personalty, did not confer upon such defendant the right to enter the room against the plaintiff's protest.

4. *Charge to jury; joint and several trespass.*—In an action of trespass against two defendants for a joint and several wrong, a charge to the jury that instructs them that "whatever judgment they rendered, if against the defendant, must be a joint judgment against both defendants," is properly refused, as being misleading and invasive of the province of the jury.

APPEAL from City Court of Birmingham.

Heard before the Hon. W. W. WILKERSON.

This was an action of trespass brought by the appellee

against the appellants ; and sought to recover damages for a trespass alleged to have been committed in the bedroom of the plaintiff. The facts of the case are sufficiently stated in the opinion..

Among other portions of the court's general charge, to which the defendants excepted, was the following instruction : "The probate proceedings could not confer any right upon the defendant Leonora J. Milner to take said property." The court, at the request of the plaintiff, gave among others, the following written charges : (1.) "If the property is in possession of another, and there is no evidence of title, the presumption is that it is the property of the person in possession, and it devolves upon the party taking it to show that he had a superior title." (2.) "The court further charged the jury that the probate proceedings could not confer any right upon the defendant Leonora J. Milner to take the said property." The defendants separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give, among other charges requested by them, the following : (10.) "If the jury believe from the evidence that, at the time the goods were taken and the room entered by defendant Rogers, the defendant Leonora J. Milner, the widow of E. L. Milner, deceased, was in general control and possession of the house, including the room occupied by plaintiff, and if the jury further believe from the evidence that at the time said room was entered and the goods taken the title to the premises was in the plaintiff and two other persons, then the plaintiff can not recover for the entering of said room." (12.) "The court charges the jury that this is a joint suit against two defendants, and whatever judgment they render, if against the defendant, must be a joint judgment against both defendants, and the jury can not find judgment for one amount against one of the defendants and another amount against the other defendant, even if the plaintiff is entitled to recover, and the jury can not find or assess punitive damages, unless they believe that both defendants were guilty of rude or improper conduct."

There was judgment for the plaintiff. Defendants appeal, and assign as error the rulings of the trial court in giving and refusing to give the several charges to the jury.

[Milner et al. v. Milner.]

LANE & WHITE, for appellants, cited *Shipman v. Baxter*, 21 Ala. 456; *Jackson v. Smith*, 75 Ala. 97; *Leinkauff & Strauss v. Morris*, 66 Ala. 406; *Motes v. Bates*, 80 Ala. 382.

WHITE & HOWZE, *contra*, cited *Layman v. Hendrix*, 1 Ala. 212-14; *Miller v. Jones*, 26 Ala. 247; *Gafford v. Stearns*, 51 Ala. 434; *Tarry v. Brown*, 34 Ala. 159; *Traylor v. Marshall*, 11 Ala. 458; *Burns v. Campbell*, 71 Ala. 291-2; *Newell v. Whitcher*, 38 Amer. Rep. 703; *Woodman v. Howell*, 92 Amer. Dec. 221, s. c. 45 Ill. 367.

MCCLELLAN, J.—This is an action of trespass prosecuted by Maud Milner against Leonora J. Milner and one Rogers. The complaint claims damages “for trespass by the defendants” on a certain described bed room, which was at the time in the possession and occupation of the plaintiff, and for “wrongfully, violently and rudely taking and carrying away” therefrom certain items of personal property. The case was tried on the general issue.

The house, of which the room in question was a part, belonged to the plaintiff and her brother and sister in common, having descended to them from their mother. After the mother's death, their father continued in possession and occupancy of the premises, plaintiff living with him, until his death not long before this litigation arose. Meantime he had taken a second wife in the person of the defendant Leonora J. Milner who continued to reside in the house down to the time of the alleged trespass, plaintiff all the time occupying this room. Said defendant had the personal effects in the room set apart to her and a minor son of her late husband by his first marriage by a decree of the probate court, as in part their exemptions of personalty from administration; but plaintiff insisted on the trial of this case, and introduced evidence going to show, that her father had given her most of this property in his life time, and that as to the rest it had belonged to her mother and became hers at her mother's death. This gift by the father was denied by defendants, and one aspect of the evidence tended to show the contrary. There was also evidence that after her husband's death, Leonora continued in some sort the head of the family. She was

about to leave the premises, however, when the alleged trespass was committed. Indeed the trespass, if such it was, was a part of the act of removal by her, the personalty being taken from plaintiff's room and carried away in furtherance of that purpose. To this end the defendant Rogers, acting for the said Leonora, entered this apartment of hers against her warning and objection, having with him several negroes, and taking his seat in the room ordered them to remove its contents, which they proceeded to do. Plaintiff testified further that Rogers "was rude" in his conduct toward her, and to this testimony there was no objection.

It is manifest that the gist of this action lies in the disturbance of plaintiff's possession and occupancy of the room, and not in any injury done to the room itself, and hence, if her possession was rightful and was wrongfully disturbed the right of action is in her alone and not in her conjointly with her co-tenants in common. Having with others the title, it can not be doubted and is not contended but that her possession was rightful. The insistence is, however, that the disturbance thereof was not wrongful, the theory being that the defendant Leonora Milner, having remained in the house after the death of her husband, and continued to be, in a sense, the head of the household, had a right to enter any room on the premises including this one, notwithstanding objections on the part of those in the rightful occupation and use of them. We are unable to concur in this view. Mrs. Milner, the defendant, was wholly without right to even continue on the premises after the death of her husband. She did remain there at the mere will and sufferance of the plaintiff, who was the only common tenant in possession. Her assumption or continued exercise of control as head of the family was similarly without other warrant than plaintiff's forbearance until such time as she chose to put an end to it. Having thus the right to the exclusive possession of the premises as against Mrs. Milner whenever and to whatever extent she saw proper to assert it, it was of course competent for her at any time, and in the mode shown by the evidence to have been adopted by her, to assert that right in respect of the room personally and immediately occupied by her, and after such assertion—after her protest and objection to Mrs. Milner's entering that room in the

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person of her agent and his assistants—the defendants had no more right to cross its threshold than had they been the most casual strangers. Moreover, it is shown that Mrs. Milner was in the act of removing from the premises, and this would seem of itself to amount to a relinquishment of any right—if otherwise she would have had such right—based on the facts of her having continued to live in the house up to that time and acted as head of the family, if she had so acted. The entry into the plaintiff's room was, therefore, a trespass, and it was none the less so on the concession that the personal property therein belonged to Mrs. Milner. There is no authority in the law for taking and carrying away even one's own property through the commission of a trespass upon the property—possessory or by title—of another. On this principle the court properly instructed the jury that the probate proceedings, under which Mrs. Milner claimed the property, did not confer any right upon her to take it in the manner shown by the evidence. And this charge might also, perhaps, be rested on the consideration that if, as one aspect of the evidence went to show, this property belonged to plaintiff and not to the estate of her father, the probate proceedings were abortive to confer any right or title in or to it upon the widow and minor child, it not appearing that plaintiff was a party to those proceedings, even if that would make a difference, which we do not decide.

What we have said disposes of the objection to that part of the general charge whereby the jury were instructed that, "if the plaintiff was occupying the room, she had a right to it as against a wrongdoer," it being, as we have seen, undisputed that her occupation was rightful, and, as we have held, that such occupation became exclusive of Mrs. Milner and her agents upon plaintiff's objection to their entry. The jury could not have been *misled* to the conclusion that defendants were wrongdoers; under the uncontroverted evidence they were wrongdoers.

Charges 1 and 2, given at the request of the plaintiff, and the refusal of the court to give charge 10, requested by defendants, are similarly covered, and exceptions to these rulings of the court determined adversely to appellant by the conclusions announced above.

This action is joint and several. It was with the jury

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to say that both defendants were guilty, or that neither was, or that either one was. It is a sufficient disposition of the exception to the court's refusal to give defendants' 12th charge, to say that the jury would thereby have been instructed that whatever verdict they might return, "if against the defendant, must be a joint judgment against both defendants." This would have been misleading and invasive of the province of the jury.

We have considered all the assignments of errors insisted on in argument, and, finding them without merit, the judgment is affirmed.

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Action on the Case.

1. *Action on the case; destroying landlord's lien.*—An action on the case will not lie against one who, with notice of a landlord's lien, receives from the tenant property subject to said lien, unless it appears that he has disposed of the property or its proceeds, so that the lien can not be enforced against either.

2. *Same; averment of complaint.*—When, in an action on the case to recover damages for the taking by defendant of cotton or its proceeds, on which the plaintiff alleged that he had a landlord's lien, there is no averment in the complaint that the defendant has converted or removed the cotton or its proceeds, so that the lien can not be enforced thereupon, such complaint is defective, and subject to demurrer.

· **APPEAL** from the Circuit Court of Montgomery.

Tried before the Hon. JOHN R. TYSON.

This was an action on the case brought by the appellant against the appellee; and sought to recover damages for the taking by the defendant of "three bales of cotton or its proceeds," on which the plaintiff alleged that he had a landlord's lien for rent.

The complaint filed by the plaintiff in this case was in the following language: "The plaintiff claims of the defendant one hundred dollars damages, for that plaintiff is the holder and owner by transfer of a rent note made by Abner Williams, on the 24th day of January, 1891, for the payment of one hundred dollars, to F. L. Ashley,

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for rent for the year 1891 of thirty-five acres of land lying in the county of Montgomery, Alabama, about four miles west of the city of Montgomery, being part of said F. L. Ashley's farm, which said rent note was due on the 15th of October, 1891. Plaintiff avers that said Williams raised three bales of cotton during the year 1891 on said rented premises, besides other produce, and turned over said three bales of cotton or its proceeds to said defendant, without paying said rent, and without consent of plaintiff, and said defendant received said cotton or its proceeds with notice that the same was subject to a lien for said rent; that said rent is unpaid and due, and plaintiff's lien on said three bales of cotton has been lost by said wrongful conduct of defendant, wherefore plaintiff sues." The defendant demurred to this complaint on the grounds: 1st. Said complaint fails to show that defendant had any knowledge, or means of knowledge, that the proceeds of the bales of cotton alleged to have been turned over to defendant was affected by any lien of plaintiff. 2d. Said complaint fails to show how said proceeds of the cotton were subject to any lien in favor of the plaintiff. 3d. Said complaint fails to show any act by which the plaintiff has been deprived of any lien. 4th. Said complaint fails to show with sufficient certainty what defendant has received. The court sustained these demurrers, and the plaintiff declining to plead further, judgment was rendered for the defendant.

On this appeal the plaintiff assigns as error the sustaining of the demurrers, and the rendering of judgment for the defendant.

E. P. MORRISSETT, for appellant.—The contention of the defendant, that an action on the case could not be maintained for the proceeds of rent cotton, and that the proper action was *assumpsit* is not tenable. Where a tort is committed the injured party may sue in tort, or he may waive the tort and sue in *assumpsit*. The only question in this case, whether the landlord has a lien on the proceeds of rent cotton, has been repeatedly decided in the affirmative by this court.—*Hussey v. Peebles*, 53 Ala. 435; *Warren v. Barnett*, 83 Ala. 208, 3 So. Rep. 609; *Westmoreland v. Trousdale*, 60 Ala. 455-6.

GORDON MACDONALD, *contra*.

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COLEMAN, J.—This was an action on the case by the appellant Ehrman against the defendant Oates. A demurrer was sustained to the complaint, and the plaintiff, declining to amend or plead further, judgment was rendered for the defendant. The only question presented by the record is, whether an action on the case will lie in favor of a landlord against one, with notice, to whom a tenant pays the money, the proceeds of property sold by the tenant upon which the landlord held a lien for rent. The statute gives the landlord a lien upon the crops grown upon the rented premises, and provides that the lien may be enforced by attachment, which may be levied upon the crops or *proceeds thereof*.—Code, §§ 3056, 3063. Any person who knowingly, by purchase or otherwise, deprives the landlord of the opportunity of enforcing this lien is guilty of a tort, and is liable in an action on the case. The right of action is given against those who wrongfully deprive the landlord of his remedy.—*Hussey v. Peebles*, 53 Ala. 434; *Westmoreland v. Foster*, 60 Ala. 455; *Price v. Pickett*, 21 Ala. 741.

The legal effect of the lien given to the landlord does not invest the landlord with a *jus ad rem* or a *jus in re*, but a prior right of payment; the right to have so much money carved out of the proceeds. When the property has been converted into money by the tenant, the proceeds is subject to levy in his hands, or the hands of one who receives it with knowledge of the lien. This is the effect of section 3063 of the Code.

Action in case will lie against a tenant who by sale or otherwise disposes of the property in such manner that the lien can not be enforced by attachment, and also against one who, knowing of the lien of the landlord, places the crop or property beyond the remedy of the landlord. If the tenant sells the property and has the proceeds in possession, or if he pays the money over to a third person, who has notice that it is the proceeds of property upon which there is a lien, assumpsit will lie to recover it; or a court of equity will declare a trust. *Pickett's Case*, *supra*; *Westmoreland Case*, *supra*. The statute says the proceeds are subject to a levy, (Code, § 3063), and we have held the effect of this section was to extend the lien to the proceeds of the crop.—*Scaife & Co. v. Stovall*, 67 Ala. 243; *Barnett v. Warren & Co.*, 82 Ala. 557, 2 So. Rep. 457.

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There is no averment in the complaint that the defendant has ever converted or removed the cotton or its proceeds. *Non constat*, but that the cotton or its proceeds is held by the defendant, subject to the remedy of the landlord. Until there has been some act by the defendant by which the lien is destroyed, or the lien can not be enforced upon the property or its proceeds, we can not say the defendant is liable in case. The averment, that the lien was lost, is a mere conclusion of the pleader, and does not follow from the facts averred in the complaint. The complaint is defective, and subject to demurrer.

Affirmed.

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Bill in Equity by Stockholders of a Railroad Corporation to cancel a Lease by said Corporation, and to Enjoin another Railroad Corporation from voting at Election of Officers.

1. *Lease of one railroad company by another.*—Under the general law, in the absence of special statutory authority, one railroad corporation has no power to lease its road or other property to another railroad corporation.

2. *Same; when contrary to statutory provisions; equity of bill for cancellation.*—Under the statutory provisions of this State (Code, § 1586), a railroad corporation can lease its road and property to another railroad company that is continuous or connected with it by the performance by each of the companies of the requirements of said section; but a lease executed by two such railroad companies is invalid, which, while reciting that it was executed by the directors of each company, does not recite that the stockholders' meeting of one of the companies was called by its directors at a time and place, and in the manner designated by them, and in reference to the other company its recitals fail to show that the lease was assented to by a majority in value of the stockholders, represented in person or by proxy at a meeting called by the directors, at such time and place, and in such manner as they might designate; and a bill filed by the stockholders of one of the railroad corporations, seeking the cancellation

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of said lease, which is made an exhibit to their bill, is not demurrable on the ground that said lease was valid and not contrary to law.

3. *Demurrer to an entire bill.*—A demurrer to a bill in equity as a whole can not be sustained, if, for any equity apparent in the bill, the complainants are entitled to relief.

4. *Injunction against a railroad corporation voting stock in another railroad corporation.*—Where one railroad corporation has purchased a majority of the stock of another railroad corporation, with the intent and purpose of getting the management and control thereof, in order to defeat or lessen competition in the businesses of the two companies, or to encourage monopoly, and the corporation owning the majority of the other's stock violates duties in respect of the property and rights of the other company and its stockholders, committing willful wastes and subjecting said company to a multiplicity of suits, a court of equity will interfere, by an injunction at the suit of a minority of the stockholders, to restrain the said corporation owning the majority of the stock from the use of said stock in the management of the affairs of the other corporation and in the election of its officers.

5. *Same; jurisdiction of court of equity notwithstanding property in the hands of a receiver.*—In a bill filed to enjoin a railroad corporation owning a majority of the stock in another railroad corporation from voting its stock in the management of the affairs of the latter company, and in the election of its officers, the jurisdiction of the court is not ousted, and the right to grant the relief prayed for is not effected, by the fact that the road whose stock is controlled by the other corporation is in the hands of a receiver, appointed by other courts.

6. *Same; laches.*—Where a bill is filed by stockholders in a corporation to enjoin another corporation owning a majority of the stock of the former corporation from voting its stock in the control of the affairs and in the election of the officers of the said corporation, the fact that the complainant stockholders, after full knowledge of the grounds of complaint alleged in their bill, or full opportunity to acquire such knowledge, acquiesced in the acts complained of for more than six years, does not debar them from having enjoined such use of the stock in the future.

7. *Injunction against a corporation at suit of stockholders; previous request to directors for action.*—A minority of the stockholders of a corporation can not maintain a bill in equity to prevent illegal action on the part of the majority, without a previous request to the proper officers to interfere, and their failure or refusal to do so; but when it is shown that a majority of the stock of said corporation is owned by another corporation, which practically creates and controls the managing and governing bodies of said corporation, the necessity for such a demand upon the governing body is dispensed with, as any such demand would be fruitless.

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APPEAL from the Chancery Court of Bullock.

Heard before the Hon. JERE N. WILLIAMS.

The bill in this case was filed on October 25, 1893, by the appellants against the appellees. The allegations of the bill, the relief prayed for, and the grounds of demurrer are sufficiently stated in the opinion. The appeal is prosecuted by the complainants, who assign as error the decree of the chancellor sustaining the demurrers interposed.

GEORGE F. MOORE, for appellants.—1. The holding and use by the Central company of the majority of the capital stock of the Girard company for the purpose of controlling and managing it under the circumstances shown in the bill, was and is a continuous wrong and threat of injury to the minority stockholders, and gives the bill equity without reference to the lease.—*M. & C. R. R. Co. v. Woods*, 88 Ala. 630, 7 So. Rep. 108; *Central R. R. Co. v. Collins*, 40 Ga. 582; *Am. Refrigerating Co. v. Linn*, 93 Ala. 612-13, 7 So. Rep. 191.

2. The court erred in holding that the State chancery court had no jurisdiction of the case. The statement that "the property is in the hands of a receiver," which is incorporated in this demurrer, is not found anywhere in the bill. On the contrary, it is stated in the bill that the courts of the United States had never taken jurisdiction over the Girard road. "A demurrer to a bill in equity must be based on matter apparent on the face of the bill, and can not be supported by any new fact or foreign matter alleged by the defendant."—*Bromberg v. Heyer*, 69 Ala. 22; *Ramage v. Towles*, 85 Ala. 588, 5 So. Rep. 342; *Knorr v. Childersburg Land Co.*, 86 Ala. 182, 5 So. Rep. 578; *Manning v. Phippen*, 86 Ala. 362, 5 So. Rep. 572. But if the bill had shown that the property of the Girard company was in the hands of a receiver, this fact would not have ousted the jurisdiction of the court in this case. The State court would have denied the prayer of the bill for the appointment of a receiver, and ordered that the possession of the receiver should not be disturbed, but this in no way interfered with the jurisdiction of the court to enjoin the illegal use of stock, to take an account and have the lease cancelled.—*Gay, Hardie & Co. v. Brierfield Co.*, 94 Ala. 303, 11 So. Rep. 353; *Wyatt v. O. & M. R. Co.*, 10 Brad. (Ill.) 291; *O. &*

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M. R. Co. v. Russell, 23 Amer. & Eng. R. R. Cases, 149; Gluck & Becker on Receivers, § 7, page 23.

3. The reasons shown by the allegations of the bill why complainant did not demand the board of directors of the Girard company to institute the present suit constituted a sufficient excuse for not making such demand. *Mack v. DeBardelaben Co.*, 90 Ala. 400, 8 So. Rep. 150; *Rothwell v. Robinson*, 39 Minn. 1. The Central company, by reason of its ownership of the majority stock in the Girard company, could control both sides of any litigation instituted against it, unless the use of its said stock is restrained. Under such circumstances, a demand on directors elected by that company would be not only useless, but absurd.—*Knoop v. Bohmrich*, 36 Amer. & Eng. Corp. Cases, 315; *Bickerhoff v. Bostwick*, 88 N. Y. 59; *Menier v. Hooper*, 9 Ch. Ap. Cases 350; 2 Pomeroy's Eq. Jur., § 1095, pp. 162-7-8.

4. The court erred in holding that complainant had been guilty of *laches* in instituting the present suit.—*Board v. Lafayette R. R. Co.*, 50 Ind. 112-113; *Campbell's Appeal*, 80 Pa. St. 301; Cook on Stocks and Stockholders and Corporation Law, §§ 729, 731, 732.

5. The court erred in decreeing that the lease of 1886 was a valid and subsisting contract. The said lease shows on its face that it was not executed in accordance with the provisions of the statute.—Code, § 1586; *M. & C. R. R. Co. v. Grayson*, 88 Ala. 576, 7 So. Rep. 122; *Penna. Co. v. St. L., A. & C. R. R. Co.*, 118 U. S. 317. The Central company was prohibited by the fundamental law of the State which created it from accepting that lease, or from buying or using the majority of the stock in the Girard company for the purpose of encouraging monopoly or lessening competition.—*Rowena Clarke v. Central Co.*, 50 Fed. Rep. 338; *Langdon v. Branch*, 37 Fed. Rep. 449; *Central R. R. Co. v. Collins*, 40 Ga. 582; *M. & C. R. R. Co. v. Woods*, 88 Ala. 630, 7 So. Rep. 108; 101 U. S. 71; 67 N. H. 537.

6. The appointment of a receiver does not prevent a stockholder from bringing an action against the corporation of which he is a member and another. See authorities cited *supra*; also 7 Daly, 273; 10 Bradwell (Ill.) 291, 14 Wall. 383. The bill shows that the Girard company was never made a party to the proceedings in the United States courts, and any order appointing a

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receiver over its property in a suit to which it was not a party is a nullity.—High on Receivers, § 84; *Gravenstine's Appeal*, 49 Pa. St. 310; *Baker v. Backus*, 32 Ill. 96; Beach on Receivers, § 413.

P. B. McKENZIE, for appellant, also filed a written argument discussing the several grounds of demurrer.

LAWTON & CUNNINGHAM, for Central Railroad & Banking Co.—The gravamen of the bill in this case is the illegality of the lease of the Mobile & Girard Railroad Company by its board of directors to the Central Railroad & Banking Company of Georgia. The Central Railroad & Banking Co. of Georgia was chartered by the legislature of Georgia, December 14, 1835 (Acts 1835, p. 217), and under the act of the legislature of Georgia of 1852, approved January 22, (Acts 1852, p. 119), the Central railroad was authorized to lease any railroad that then or thereafter should connect with it. The Central railroad having this power to lease the connecting railroads under the act of 1852, there is nothing in the constitution of Georgia that can destroy or abridge it, and the said lease is not contrary to the public policy of the State of Georgia.—Code of Georgia, § 1689; *Smith v. DuBose*, 78 Ga. 435; *Central R. R. v. Mayor &c. Macon*, 43 Ga. 615.

Even if the lease was illegal, it can not avail complainants, for they have acquiesced therein for six years, with full knowledge of the fact, and are estopped.—*Cozart v. Ga. R. R. Co.*, 54 Ga. 383; *Alexander v. Searcy*, 8 S. E. Rep. 630; *Phosphate Co. v. Green*, L. R. 7 Com. Pl. 43; *Kelley v. Newburyport &c. R. R.*, 24 Amer. & Eng. R. R. Cases, 27; *Taylor v. S. & N. Ala. R. R. Co.*, 13 Fed. Rep. 152; *Sheldon Hat &c. Co. v. Eickemeyer &c. Co.*, 90 N. Y. 607; 2 Herman on Estoppel, § 1136, p. 1323; Cook on Stockholders, § 731; Beach on Priv. Corp., § 431; 2 Morawetz on Corp., §§ 631, 632, 633.

Stockholders who wish to sue for the corporation must show some reason why the corporation will not sue for itself. A mere allegation that the majority of the stock is held by another will not suffice to excuse the application to the directors.—*Tuscaloosa &c. Co. v. Cox*, 68 Ala. 71; *Nathan v. Tompkins*, 82 Ala. 437, 2 So. Rep. 747; *M. & C. R. R. Co. v. Woods*, 88 Ala. 630, 7 So. Rep. 108; *Tutwiler v. Tuscaloosa &c. Co.*, 89 Ala. 391, 7 So. Rep. 398;

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Mack v. DeBardelaben &c. Co., 90 Ala. 400, 8 So. Rep. 150; *Hawes v. Oakland*, 104 U. S. 460; *Huntington v. Palmer*, 104 U. S. 482; *Quincey v. Steele*, 120 U. S. 241; *Dannmeyer v. Coleman*, 11 Fed. Rep. 97 (10); *Detroit v. Dean*, 106 U. S. 537-542.

PEABODY, BRANNON, HATCHER & MARTIN, for Mobile & Girard Railroad Co.—The ulterior object of complainants is to avoid and set aside the lease made by the Mobile & Girard Railroad Company to the Central Railroad & Banking Company of Georgia of all their property and franchises. The immediate object is to have a receiver appointed by the chancery court of Bullock county to take possession of the Mobile & Girard railroad, and operate the same pending the litigation. It appears from the allegations in the bill that at and before the filing of the same the Central Railroad of Georgia was in the hands of H. M. Comer, as receiver, appointed by the chancery courts both of Georgia and Alabama, and that he also was in possession of the property of the Mobile & Girard railroad as a part of the property of the Central railroad under this lease. Hence the chancery court of Bullock county could not disturb the possession of the receiver appointed by the U. S. court.—Beach on Receivers, par. 226, 213; 102 U. S. Rep. 256, 2 Wallace, 609; 24 Howard 450; 21 Howard, 506; 3 Wallace, 334, 2 Woods, 618. It is true that complainant denies the regularity of this appointment, but the right of the receiver to hold possession can not be collaterally attacked.—*Comer v. Bray*, 83 Ala. 217, 3 So. Rep. 554. Nor can it be attacked or his possession disturbed when he is not made a party to the proceedings.—8 Paige (New York Ch.) 566; 2 Woods, 626.

While no leasehold estate can be created in Alabama for a longer term than twenty years, yet a lease for 99 years is good for twenty years, and as this lease was made in 1887 it still has several years to run.—Code, § 1855; *Pope v. Pickett*, 65 Ala. 487; *Robertson v. Hayes*, 83 Ala. 290, 3 So. Rep. 674; *Trammell v. Chambers Co.*, 93 Ala. 388, 9 So. Rep. 815.

HEAD, J.—This bill is exhibited by C. S. Lee and Fannie M. George, citizens of Alabama, and stockholders in the Mobile & Girard Railroad Company, against

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that company, an Alabama corporation, and the Central Railroad and Banking Company of Georgia, a Georgia corporation. It is filed in behalf of the complainants and all other stockholders of the Mobile & Girard company (except the said Central Railroad & Banking Company of Georgia) who may come in and make themselves parties and contribute to the expenses of the suit. The purpose of the bill is to enjoin the Central company from voting certain stock held and claimed by it in the Mobile & Girard company; to vacate, as void, a certain lease of its road and other property and franchises by the Mobile & Girard company to the Central company, and for an accounting from the latter company for its use and abuse of the property and rights of the former, while in possession of the same. A receiver of the property of the Mobile & Girard company is also applied for. The allegations show that, prior to the 13th day of September, 1882, the Central company had acquired 4,538 shares of the capital stock of the Mobile & Girard company, of the face value of \$438,000, and on that date controlled about 2,799 shares of preferred stock in said Girard company, on which it, the Central, held a mortgage, and which it voted in meetings, and at elections of officers, of the Girard company. At that date, the whole amount of capital stock of the Girard company outstanding was of the face value of \$1,268,372.74, or about 12,683 shares; that on June 1, 1891, the Central owned 8,161 $\frac{1}{2}$ shares of said stock, and that the whole number of shares then outstanding was 12,679 $\frac{70}{100}$, and that the Central company, by reason of its ownership and control of the majority of the stock, has directed and controlled the election of the directors and officers of the Girard company ever since the year 1882, and up to and including the last election. It is then alleged that the Central company is a corporation under the laws of Georgia, deriving all its rights, powers and franchises from the authority of that State, and subject to the limitations imposed upon it by her constitution and laws; and it is alleged that the constitution of Georgia provides that, "The General Assembly of this State shall have no power to authorize any corporation to buy shares of stock in any other corporation in this State or elsewhere, or to make any contract or agreement whatever with any such corporation which may have the effect or be intended to

have the effect to defeat or lessen competition in their respective businesses, or to encourage monopoly; and that all such contracts or agreements shall be illegal and void;" that the Central company acquired all its said stock, except about 77 shares, after the year 1873, and the larger portion of it after the adoption of the constitution of Georgia containing the provision above copied, which was December 5th, 1877; and the pleader insists that the said company was without power, under the laws of Georgia to buy said stock; and it is further insisted in the bill that it is contrary to the public policy of the State of Alabama to permit a foreign corporation thus to acquire control over a corporation created under her laws, and owing her duties under its charter contract. It is further alleged that the purpose of the Central company in acquiring the stock was to get control of the affairs and management of the Girard company, and thereby to defeat and lessen competition in the businesses of said two roads, respectively, and also to encourage the monopoly which the Central company was and has been continuously seeking to enlarge and foster as to the transportation of all freights and other business going eastward out of the State of Alabama, and over the lines of the Girard road and the Columbus branch of the Western Railroad of Alabama. It is also shown that the Central had acquired sundry other specified railroads, or control of the same, in Alabama, with the purpose to defeat or lessen competition in its business as a common carrier of freights and passengers, such being especially its purpose in its acquisition of control of the Girard company.

On September 10, 1886, the bill alleges, the Girard company, attempted to make, execute and deliver to the Central company a lease of its road and other property and franchises, a copy of which is exhibited with the bill. This lease was for a term of ninety-nine years, and embraced the railroad, and all extensions thereof, which might thereafter be constructed; and all property, assets and franchises of every description of the Girard company, with the right to the possession and enjoyment of the same. In consideration of the lease, the instrument contains many covenants on the part of the lessee company not necessary to be mentioned here. The bill charges that the Girard company had no power to make

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this lease, and the Central company no power to accept it; and that the same is void as against public policy. Its validity is assailed also on the ground, that when it was authorized and executed, the Central company controlled a majority of the Girard stock, by reason whereof it became and was, in effect, both lessor and lessee. It is also assailed, as void, under the influence of the statute of Alabama which prohibits the making of a lease for a longer term than twenty years.—Code of Alabama (1886), § 1836.

The Central company went into possession of the leased property under the lease and used and operated it until June, 1891. It appears that the Central company became insolvent and its property and rights passed into other hands. On June 15, 1891, it, the Central company, executed a lease of all its property, for a term of ninety-nine years, to the Georgia Pacific Railroad Company, but it seems that that company never went into possession, having on June 19, 1888, executed a lease of its own road to the Richmond & Danville Railroad Company; and the bill avers that the Central company delivered possession of the Girard road, its property and assets, to the Richmond & Danville company, who operated it until it abandoned possession thereof, at a time, to-wit, sometime after March 3, 1892, when it repudiated the lease of June 15, 1891, of the Central company to the Georgia Pacific company. The bill, nevertheless, states in another place, in the 18th paragraph thereof, that the "Central company has operated said road, from Columbus to its terminus, ever since it went into possession under the lease of 1886 by the Girard company to it." There were sundry suits, in equity, instituted in the federal court of Georgia and state court of Alabama, involving the Central company and its property, viz., a suit filed by Rowena Clarke on March 4, 1892, in the federal court, at Savannah, against the Central company, the Richmond & Danville company and others, ancillary to which was a bill filed in the state court at Montgomery, Alabama, on April 11th, 1892; a suit filed by the Central company itself against other companies on the 4th of July, 1892, in the federal court, and on April 11th, 1892, it also filed a bill in the state court in Montgomery, Alabama. We deem it unnecessary to set out the nature and purpose of these several suits, except to say

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that in them sundry persons were appointed receivers of the property and assets of the Central company, who went into, and are now in possession thereof, as such receivers; some of the receivers being appointed at the instance of the Central company itself. The present bill, however, expressly avers that the Girard company was not made a party to any of said suits, and that none of its property ever went into the hands of any of said receivers.

In the lease of 1886, by the Girard to the Central company, assailed as void in this suit, it is stipulated that said railroad might be extended at any time by the Central company, the consent of the Girard company being first obtained; and in the event of an extension beyond its then terminus, at Troy, Alabama, or any further extension thereof, the Girard company, would, at any time, upon the request of the Central company, its successors or assigns, issue such bonds as might be necessary to build such extension or extensions, not exceeding the ratio that the then bonded debt of the company bore to the number of miles of said railroad, and would secure the payment of such new bonds by a mortgage on the whole of its railroad; and the bill alleges that, in March, 1890, the Girard company entered into a written contract with the Central company, by which the latter agreed to build an extension from Troy southwestward to Andalusia, Alabama, a distance of towit, fifty miles; and the Girard agreed to issue and deliver to the Central its first mortgage bonds, at the rate of not exceeding \$12,781 per mile, when and as soon as the extension was completed and in operation; that the Girard also paid to the Central company \$142,500, which was the purchase money of the lands granted by Congress to aid in building said railroad, on account of the building and equipment of said road; that under said contract, the Central company constructed and equipped thirty-seven miles of said extension, and graded, and procured the necessary cross-ties to complete the remainder; that, by said contract, the Central was to complete the extension by April 30, 1891, which was afterwards extended to September 30, 1891; which promise it has failed to perform. The bill charges this violation of the contract on the part of the Central company, and complains that notwithstanding it, the Central company has obtained

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from the Girard bonds to the extent of \$37,500, more than it was entitled to, upon representations made to the Girard company that it had completed forty miles of said road according to its contract; and the bill charges that said \$37,500 is owing the Girard by the Central company, on account of that transaction; and further that the latter is indebted to the former company in a large sum, to-wit, one million dollars, on account of its failure to complete said extension, and on account of various sums due to it arising from the lease to, and operation by, the Central of the Girard road. It is also alleged that by said lease it was stipulated that the Central would pay, by way of rental of said railroad, its property and franchises, one 50-100 dollars, per share of stock, *per annum*, and the interest on the outstanding bonded indebtedness of the Girard company to the Central company, for alleged advances made; and although the Central has operated the completed 37 miles of the extension, yet the stockholders of the Girard have not derived any benefit therefrom, nor have they received, or been promised any additional rent; and the directors and officers of the Girard company, knowing these facts, have not demanded or received any additional rental or interest for the use of the 37 miles. The bill charges that the Central company and Comer, the present receiver of its property, have declared their purpose not to complete said extension, nor make good to the Girard company the said moneys wrongfully obtained from it. The bill complains of other violations of duty by the Central company, in respect of the property and rights of the Girard company, to the damage of the latter company, specifying sundry acts of willful waste; and alleges that by reason of the wrongs and delinquencies complained of, the Girard company has been subjected to the danger of a multiplicity of suits; that relying on the performance of its said contract by the Central company, it, the Girard company, had entered into a contract with the Van Kirk Land Company, stipulating that said extension should be completed by September 30, 1891.

The bill further alleges that during the period of the Central's possession of the Girard property, it was claiming the same as lessee, while at the same time it was the holder and owner of \$690,000 of the bonds of the Girard company; and also owned and controlled, as before

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stated, a majority of the stock, and elected its directors and officers. The bill reiterates the invalidity of the lease, and charges that the Central company held said property as *mortgagee in possession*, and should account to the Girard stockholders for all rents, issues and profits received by it, from the operation of the road, from June 1, 1886, to the filing of the bill.

The bill shows that complainants made no effort to induce the governing body of the Girard company, or the stockholders, to institute this suit; and, as excuse for such omission, rely upon the facts hereinabove mentioned, alleged as showing the Central's ownership of a majority of the stock and its actual election, support and supreme control of the present officers and directors. It is also averred that five of the seven directors, and the president, secretary and treasurer are residents and citizens of the State of Georgia.

The bill prays for the appointment of a receiver of the Girard road and property, with authority to complete the extension and operate the road, defend suits and generally to preserve and protect the interests of the company; that said lease of 1886 be declared void; that the Girard stock held by the Central be decreed to be purchased and held in violation of law, and the Central company perpetually enjoined from using the same in any manner, and that the Girard company be perpetually enjoined from paying any interest or dividends thereon; it prays for an accounting between the Central and Girard companies as to all transactions and accounts heretofore or now subsisting between them, and for a decree in favor of the Girard company for such a sum as may be found due; that said Girard company be put in possession of all its property as soon as the stockholders shall have met and elected directors and officers whose election was not brought about, controlled or dictated, in any wise, by the Central company, and for general relief.

The defendants demurred to the bill, the material grounds of which may be condensed and thus stated:

1. It is not alleged that complainants were not parties to said lease, or did not consent thereto after it was made.

2. The lease is not contrary to the laws of Georgia and Alabama, nor in contravention of the public policy of said States.

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3. The Central company has power under its charter and the laws of Georgia to hold stock in the Girard company, and to hold the railroad under a lease, and if it had no such power complainants can take no advantage thereof.

4. The court has no jurisdiction as the property is in the hands of a receiver.

5. At the time of filing the bill all the property of the Girard company was under lease to the Central company, and was then in the hands of a receiver of the Central company.

6. Complainants have not sued within a reasonable time, but, after full knowledge of all the grounds of complaint now complained of, or full opportunity to acquire such knowledge, acquiesced in such acts for more than six years, and have been guilty of *laches*.

7. The bill fails to show that complainants made any effort to procure the governing body of the Girard company to institute the suit, without which they have no right to sue.

The Girard company also demurred to so much of the bill as seeks the appointment of a receiver, because it appears from the bill that the property of the Girard company was in the hands of a receiver appointed by another court. And as to so much of the bill as seeks to set aside the lease, on the same ground.

It would seem useless to remark that, in disposing of these demurrers, we must observe the principle, as old as the law of pleading itself, that the demurrer admits the material allegations, well pleaded, to be true; and the court can consider no fact outside of them. We must, therefore, pass unnoticed very much of the argument of appellees' counsel, which seeks to bring to our view facts not found in the bill.

These demurrers will be considered in the order above stated.

1. The first is not insisted upon in the brief of appellees' counsel, and will not be further noticed.

2. It is well settled that, under the general law, a railroad corporation has no power to lease its road and other property to another, and that such an attempted lease is void as against public policy.—*M. & C. R. R. Co. v. Grayson*, 88 Ala. 572, 7 So. Rep. 122, and authorities there cited. But the Code of Alabama, section 1586,

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provides, that any railroad corporation, organized in pursuance of law, may lease or purchase any part or all of any railroad constructed by any other corporation or company, if the lines of such roads are continuous or connected, upon such terms and conditions as may be agreed on between the corporations or companies, respectively; but no such purchase or lease shall be perfected until a meeting of the stockholders of each of such corporations or companies has been called by the directors thereof at such time and place and in such manner as they shall designate; and the holders of a majority in value of the stock of such corporation or company, represented at such meeting, in person or by proxy, and voting thereat, shall have assented thereto. The bill shows that at the time of the execution of the lease in question, the Central company owned and operated other railroads which connected with the Mobile & Girard road. The lease, a copy of which is made a part of the bill, recites the proceedings had by the two companies, respectively, looking to the authorization of its execution. These recitals show that it was executed on the part of the Girard company under authority of a resolution of the directors, adopted in pursuance of authority conferred upon them by a previous resolution of the stockholders, adopted at a meeting held by them. It does not appear, however, from the recitals that this stockholders' meeting was called by the directors, at a time and place, and in a manner, designated by them. The bill shows that the authority to execute the lease was voted for by the Central company, owning and controlling a majority of the Girard stock. On the part of the Central Railroad and Banking Company, the recitals of the lease show only that it was executed and accepted, in pursuance of a resolution of the board of directors of that company. We must assume, as the case is now presented, that these recitals contain all that was done on the part of either company. Having undertaken to set out the proceedings, the presumption is that all were set out. *Inclusio unius exclusio alterius*. Whatever may be said in support of the sufficiency of the proceedings on the part of the Girard company, it is manifest there was not a compliance with the law by the Central company. As we have seen, the rule of public policy to which we have adverted is emphasized by the

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express mandate of the statute, that no such lease shall be perfected until a meeting of the stockholders of *each* of the corporations or companies has been called by the directors thereof, at such time and place, and in such manner as they shall designate, and the holders of a majority in value of the stock of such corporation or company represented at such meeting, in person or by proxy, and voting thereat, shall have assented thereto. The lease, therefore, by reason of non-conformity to these requirements, finds no support in this statute, but its invalidity, under the general law, is accentuated by the mandatory provisions of the statute inhibiting its execution. Unless, therefore, complainants are estopped by their acquiescence, the bill has equity for the cancellation of this lease.

It must be noticed also that the demurrer under consideration is directed to the whole bill. If for any other equity appearing in the bill, apart from the cancellation of the lease, the complainants are entitled to relief, the demurrer, on this ground, should have been overruled for that reason.

3. As we have seen, the bill alleges that the Central company holds a majority of the stock of the Girard company, acquired when, and as hereinbefore stated; and that the same was acquired with the intent and purpose of getting, by the use of such stock, the management and control of the Girard company, in order to defeat or lessen competition in the respective businesses of the two companies, or to encourage monopoly. We have seen what use the bill avers has been made of the stock by said Central company and the abuse which that company has committed of the property and rights of the Girard company, and its present condition and relation to its own property and that of the Girard company, all of which, so far as concerns the alleged ruinous consequences which resulted to the Girard company, resulted from the ownership and use of said stock by said Central company; and the bill prays, upon these allegations, that the further use of said stock in stockholders' meetings be enjoined. We had occasion to consider a similar demand for relief in the case of *M. & C. R. R. Co. v. Woods*, 88 Ala. 630, 7 So. Rep. 108, and we have in that case, an ample discussion of the whole subject, reviewing a number of authorities. We could add nothing to

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that discussion. We there said: "We hold that it is equally against public policy and against that sound rule which disables trustees, or *quasi* trustees, to act when their duty and interest conflict, that the E. T. Va. & Ga. company should be allowed to vote its majority stock in matters pertaining to the management and control of the M. & C. company." It is our opinion that the facts of this case, as disclosed by the bill, call for the application of the principle here. We think, circumstanced as the parties are alleged to be, the destinies of the Girard company should not be left in the hands of the Central company. There are important interests of the former company to be looked after, which conflict with greater interests of the latter; and it may well be believed that, without a change of management, the rights of minority stockholders are liable to suffer. Again, as we have seen, the constitution of Georgia, in force when the greater portion of the stock was acquired, ordains that, "The General Assembly of this State shall have no power to authorize any corporation to buy shares of stock in any other corporation in this State or elsewhere * * * * * which may have the effect or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and that all such contracts or agreements shall be illegal and void." It is quite clear that the averments of the bill bring this case within the influence of this provision. The Central company is a Georgia corporation, deriving all its powers from the laws of that State. The bill advises us of no provision of its charter securing to the Central company any contractual right which this provision of the constitution is incompetent to infringe. The acquisition and ownership of the greater portion of the stock held by the Central company are shown by the bill to be effectual to subvert the purpose and policy so declared by the constitution of Georgia, and to accomplish the grievances now complained of, and the bill has equity to restrain its use by reason of its illegal ownership so resulting, without reference to the remaining portion of the stock upon which, it may be said, the constitutional provision quoted can not operate. Whether it does operate upon it or not, it is unnecessary now to decide. Hence it is, both under the general law of Alabama and the organic law of Georgia,

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the present bill may be maintained (unless under issues of fact hereafter to be joined its equity may be dispelled) to restrain the use, by the Central company, of the stock it holds in the Girard company, in the management of the affairs of the latter, at least within limitations which the court of chancery may find it equitable to prescribe.

4. It may be enough to say of this ground of demurrer, viz., that the court is without jurisdiction because the property is in the hands of a receiver, that the bill distinctly avers that the Girard company's property has never gone into the hands of any of the receivers. But were the fact otherwise, it would furnish no cause why this bill should not be maintained to restrain the use of the stock as prayed. The granting of this relief would not interfere with the possession of the receivers, or the authority of the courts appointing them, over the property in their hands.—*Gay, Hardie & Co. v. Brierfield Coal & Iron Co.*, 94 Ala. 303, 11 So. Rep. 353.

5. This ground of demurrer, as well as the two grounds assigned to parts only of the bill, fails, under the influence of what has already been said.

6. The complainants have not sued within a reasonable time, but, after full knowledge of all the grounds of complaint now complained of, or full opportunity to acquire such knowledge, acquiesced in such acts for more than six years, and have been guilty of laches. We will consider this with reference to the acquisition and use of the Girard stock. It is our opinion so far as it relates to that cause of complaint, that the contention of appellees can not be supported. Let it be assumed that complainants were fully aware of the ownership of the stock by the Central company, from the time it was acquired, and of that company's use of it in the past, and acquiesced in such ownership and use, this fact furnishes no reason why they should be obliged to submit to further improper uses of the stock. The abuses committed in the past are the very grounds and causes of their present interposition, to the end that future similar abuses may be prevented. The use of the stock is continuing, and we can conceive of no just reason why a party interested, and otherwise entitled to interfere, may not interfere, at any period of such use, and object to its continuance. As well might it be said that a person who

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has for a long time, suffered, without objection, continued trespasses upon his property, is obliged, by reason of his silence, to submit to all future trespasses which the wrongdoer may be disposed to commit. We hold that the right to restrain the use of the stock is not barred by acquiescence. This conclusion necessarily results in the overruling of this ground of demurrer, although the same ground seeks to raise the right of complainants to set aside the lease, for, like the others, it is directed to the whole bill. As the question, whether complainants are estopped by their acquiescence to now question the validity of the lease, is not well presented by the demurrer, we announce no opinion upon it. It may be presented in the lower court by demurrer or otherwise as the parties may be advised is appropriate.

There is no demurrer raising the question of complainants' right to an accounting, assuming the validity of the lease, or its invalidity; or the effect upon the right to an account of the allegation that the Central company is a mortgage creditor of the Girard company, and its possession of the latter's property that of a mortgagee in possession. Those questions are left to be properly presented for decision to the court of chancery.

We entertain no doubt that the fact that the Central company owns and controls a majority of the Girard stock, and itself practically created and controls the managing and governing bodies, two or more of the officers and five out of seven of the directors being residents of the State of Georgia, dispenses with the necessity for a demand upon the governing body to institute this suit. Taking the facts stated in the bill to be true, the demand would be fruitless—*Mack v. DeBardelaben*, 90 Ala. 400, 8 So. Rep. 150; *M. & C. R. R. Co. v. Woods*, *supra*, and cases cited on page 647.

The chancery court erred in its ruling, and its decree is reversed, and a decree here rendered overruling the demurrers and remanding the cause for further proceedings. The defendants will plead to or answer the bill within sixty days, with power in the chancery court, or chancellor in vacation, to extend the time on sufficient showing.

Reversed, rendered and remanded.

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Harwell & Clark v. Lehman & Son.

1. *Plea of set-off; when not sustained by evidence.*—When, in an action on a note, there is interposed a plea of set-off, founded upon damages claimed by reason of plaintiff's failure to deliver certain goods as agreed upon when the note sued on was executed, but the defendant does not introduce evidence of the difference between the contract price of the goods and their value at the time and place of delivery, and thereby fails to furnish a basis for the ascertainment of the damages claimed, the plea of set-off is not sustained, and judgment should be rendered for plaintiff on such plea.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. N. D. DENSON.

This suit was on a note by appellants to appellees for \$75.99, dated August 5, 1891, and payable 1st of October thereafter. There was no plea of the general issue; but there were two special pleas, Nos. 1 and 2, and two others in short, viz., failure of consideration and tender; but there was no evidence introduced on the two latter. The case was tried on the special pleas. The first of these was a plea of set-off of \$50, which, it is averred, the plaintiffs owed the defendants at the time said note was executed; and it is further averred in said plea that, at the time said note was executed, there was an unsettled account between plaintiffs and defendants, which was disputed in part, and it was agreed, "that in consideration that defendants would, at that time, pay the full amount claimed by plaintiffs, and execute said note declared on, the plaintiffs did agree in writing to sell and ship to defendants one barrel of McBrayer whisky on or by the 1st of October, 1891, for, and at the price of \$2.85, which defendants aver was 90 cents under the market value of such goods," &c., and it is also further averred in said plea, that plaintiffs failed and refused to ship to them the said barrel of whisky, which contained 45 gallons or more; and in consequence of such failure, defendants were damaged to the extent of \$40.50. The second special plea is to the effect that plaintiffs owed the defendants \$50 on their claim against them for their failure to ship said whisky, whereby they were damaged to that extent.

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The facts of this case, as shown by the bill of exceptions, are, that defendants below, appellants here, owed the plaintiffs, appellees, an unsettled account for goods and merchandise which plaintiffs had sold to them. The sales had been made to defendants by one A. P. Ingram, who represented the plaintiffs. James L. Harwell, one of the defendants, testified that all the transactions they had had with plaintiffs were through said Ingram, the travelling salesman of plaintiffs; that they notified said Ingram that several of their purchases of goods from him had come up short, for which they claimed an offset; that Ingram collected moneys due from defendants to plaintiffs, and on the 5th August, 1891, he came to defendants for a settlement of their accounts with plaintiffs; that it was shown by this settlement that they owed plaintiffs some \$300, and they paid Ingram all that was owing except \$150.99, and for this amount they gave their two notes payable to plaintiffs, one for \$75 and the other for \$75.99, which last note is the one sued on, the first note for \$75 having been paid by defendants; that they refused to pay the one sued on, unless plaintiffs would ship them a barrel of McBrayer whiskey of 1886, at \$2.85 per gallon, for which they had given Ingram an order at the time of settlement.

The deposition of Simon Lehman, one of the plaintiffs, was offered by defendants, who testified, that plaintiffs were wholesale liquor dealers, and had, prior to August 5, 1891, the date of the note in suit, sold several barrels of whiskey to defendants; and on that day, they owed plaintiffs \$150.99, for which they gave their notes, one for \$75, due September 15th, 1891, which was paid, and one for \$75.99, payable October 1st, 1891, which has not been paid; that plaintiff did not, at that time, owe defendants any money,—\$50, or any other amount,—and never acknowledged that they owed any such indebtedness, nor authorized any one else to acknowledge or pay defendants anything; that before the last named note became due, defendants gave an order for a barrel of McBrayer whiskey at \$2.85 per gallon, which plaintiffs did not ship, because defendants' mode of conducting business was not satisfactory to plaintiffs; that plaintiffs did not care to ship to them, because they took so long to pay their bills; that defendants were hard to deal with, always disputing or claiming something, to evade

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or put off paying their bills; that any order sent by Ingram was sent subject to plaintiffs' approval; that he sent an order for one barrel of McBrayer's, 1886, at \$2.85, on 4 months, but not in any way conditional, so far as plaintiffs knew, upon defendants signing said notes, for the amount for which they gave their note was considerably past due and fully owing to plaintiffs; that Ingram was not sent to defendants by plaintiffs under any special orders; that said Ingram makes sales for plaintiffs on commissions, and is paid according to the sales he makes. He collected for plaintiffs, as a matter of accommodation, but all orders and collections he sends to plaintiffs are subject to their approval.

The defendants then offered in evidence a paper writing in words and figures as follows: "8-5, 1891. In consideration of a settlement, we agree to ship to Harwell & Clark 1 bbl. McB., 1886—2.85; 4 Mo's, Oct. 1. [Signed] A. P. Ingram for S. Lehman & Son." This paper, as was shown, was given by Ingram to defendants, on the day of settlement. It was objected to by plaintiffs as evidence against them; and the objection was sustained, and defendants excepted.

This was all the evidence, and at the request of plaintiffs in writing, the court gave the general charge in their favor, to which defendants excepted. There was judgment for plaintiffs. The defendants appeal and assign as error the exclusion of said paper writing, the giving of the general charge for plaintiff, and the judgment of the court against defendants.

JOHN A. TERRELL, for appellants.

H. A. GARRETT, *contra*.

HARALSON, J.—The evidence of the defendants makes it satisfactorily appear, that they owed the plaintiffs the full amount for which they gave their notes. The fact that they gave their notes for it is *prima facie* evidence of such indebtedness. The only claim that they make against the note sued on is, that, at the time it was given to Ingram, they claimed that some of the goods, for which the open account of plaintiffs against them was made, had come up short, and that they refused to settle the same, unless plaintiff would ship to them a

barrel of McBrayer whiskey, on 4 months time, at \$2.85 per gallon, for which they gave Ingram an order, at the time of settlement. The plaintiffs claim, and offer evidence to show, that Ingram had no authority to represent them and to make any such settlement; but the contention of the defendants is, that, having accepted and sued on the note, given with such a condition, the plaintiffs ratified Ingram's agreement to ship the barrel of whiskey and are bound by it. If all that defendants claim in this regard were conceded the evidence is wanting, so far as the record discloses, to show that defendants suffered any damage, as claimed in consequence of plaintiffs' failure to ship said whiskey. The measure of damages for the failure to deliver goods according to contract of sale is the difference between the contract price and the value of the chattels at the time and place of delivery, with interest.—5 Amer. & Eng. Encyc. of Law, 30; 3 Brick. Dig., 295, § 27.

What the value of the whiskey was, at the time and place of delivery, no where appears, without which, there was no basis for the claim, or ascertainment of damages, by way of set-off, against plaintiffs' demand.

The court committed no error of which defendants can complain, in its rulings on the exclusion of evidence; and in giving the general charge in favor of plaintiffs, there was no error. The defendants failed to establish the set-off claimed.

Affirmed.

Wells et al. v Watson.

Statutory Action of Ejectment.

1. *Recitals of deed as evidence of consideration.*—As against an antecedent judgment creditor, claiming as purchaser at a sheriff's sale under execution issued on his judgment, a recital in a deed from the judgment debtor to a third party is no evidence of the payment of a valuable consideration by the grantee therein, and, unaided by other evidence, is insufficient to sustain the conveyance against the purchasing creditor.

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APPEAL from the Circuit Court of Covington.

Tried before the Hon. JOHN P. HUBBARD.

This was a statutory action of ejectment brought by the appellee against the appellants. There was judgment for the plaintiff, and defendants appeal. All the facts are sufficiently stated in the opinion.

B. H. LEWIS, for appellants.

J. D. GARDNER, *contra*.

STONE, C. J.—This was a statutory real action, instituted in 1890 by Watson against Chandler and Dozier Wells, for the recovery of the land described in the complaint. Defendants disclaimed as to one of the subdivisions, and as to this part of the tract there was no contest. As to the other part of the tract they pleaded not guilty, which, under our statute, was an admission that they were in possession. As to this latter parcel the only question was, which party had the better title?

Watson made title as follows: At the spring term, 1879, of the circuit court of Crenshaw county, Alabama—a county adjoining Covington—he, Watson, recovered a judgment against Levi Wells and Lizzie Wells for \$824. On this judgment executions were issued and placed with the sheriff at the following dates, sometimes in Crenshaw county, and sometimes in Covington county, that is to say: On March 27, 1879; May 30, 1885; November 30, 1887; May 17, 1888. On some of these executions partial collections were made, and others were returned no property found. No question is raised on the *bona fides* of this debt; and that in large part it remained unsatisfied. On May 17, 1889, an *alias* execution was issued and placed in the hands of the sheriff of Covington county, under which he levied on the lands in controversy; and having advertised them for sale, he sold the same at the court house door of said county, Ezekiel Watson, appellee, became the highest bidder, and was declared the purchaser. He received the sheriff's deed, which was put in evidence.

The title of defendants consisted of a deed executed by L. T. and Lizzie A. Wells, bearing date November 15, 1887, by which they conveyed the lands to M. D. Wells, on a recited consideration of \$600. There was no proof

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offered for M. D. Wells that he paid, or promised to pay, the purchase money, save the recital in the deed. The question raised was, whether that recital in the deed was sufficient to sustain the conveyance against the claim of an antecedent creditor of Levi and Lizzie Wells. The circuit court ruled that it was not, and Watson had judgment for the recovery of the land. That ruling of the court is assigned as error, and this presents the sole question for our consideration.

In *Ellis v. Allen*, 80 Ala. 515, 2 So. Rep. 676, this court said: "When it is shown that the attaching creditor's debt antedates the sale or conveyance, the burden is on the grantee to prove payment of an adequate and valuable consideration." In *Hamilton v. Blackwell*, 60 Ala. 545, we said: "On the clearly established fact, that the debt to complainant was older than the deed to Miss Blackwell, the burden was on her to show by proof that the debt from her brother to her, to the extent of fifteen hundred dollars, really existed." In *Tutwiler v. Munford*, 68 Ala. 124, we employed this language: "As against antecedent creditors, and those holding in their right, the recitals in the deed from Thomas T. to Emma Munford are not evidence of consideration." See also *Lipscomb v. McClellan*, 72 Ala. 151; *Calhoun v. Hannon*, 87 Ala. 277, 6 So. Rep. 291; *Thorington v. City Council*, 88 Ala. 548, 7 So. Rep. 363; *Dollins v. Pollock*, 89 Ala. 351, 7 So. Rep. 904, and authorities cited.

There is no error in the record.
Affirmed.

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Action of Assumpsit.

1. *Statute of frauds; promise to answer for debt, default or miscarriage of another.*—When at the instance of one person, goods are sold to another for his sole use and benefit, and any credit whatever is extended to the party to whom the consideration moves, the debt is that of the latter, and the other party's obligation is that of guarantor, which, under the statute (Code, § 1732), to be binding must be in writing.

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2. *Same*.—When in an action to recover for goods sold, it is shown that the defendant applied to the plaintiff to fill an order for another person, and said that he, the defendant, “would guarantee the bill and pay for it,” and that thereupon the goods were shipped and the account was charged on the books of the plaintiff to the person for whom the goods were bought, and that the plaintiff looked for payment to both the defendant and the person for whom the goods were bought, the promise of the defendant was to answer for the debt, default or miscarriage of another (Code, § 1732), and to be binding should have been in writing, expressing a consideration signed by him.

APPEAL from the Circuit Court of Jefferson.

Tried before the Hon. W. R. HOUGHTON, Special Judge.

The facts of this case are sufficiently stated in the opinion.

ALBERT E. BARNETT, for appellant, cited *Boykin & McRae v. Dohlonde & Co.*, 37 Ala. 577; *Marx v. Bell, Moore & Co.*, 48 Ala. 497; *Clark v. Jones & Bro.*, 87 Ala. 474, 6 So. Rep. 362.

JOHN H. MILLER and F. E. BLACKBURN, *contra*, cited *Marx v. Bell, Moore & Co.*, 48 Ala. 497; *Boykin v. Dohlonde*, 37 Ala. 578; *Rhodes v. Leeds*, 3 Stew. & Porter, 212; *Clark v. Jones & Bro.*, 87 Ala. 474, 6 So. Rep. 362; *Ware v. Morgan*, 67 Ala. 461; 1 Amer. & Eng. Encyc. of Law 401, § 11; Mechem on Agency, §§ 287, 288, 710; *Nicholson v. Moog*, 65 Ala. 471.

McCLELLAN, J.—This cause was heard and determined by a special judge of the circuit court on its merits without the intervention of a jury. Judgment was rendered for the plaintiff, to which the defendant excepted, and the propriety of the court's action in that respect is now presented for our consideration by a bill of exceptions; and it becomes our duty to review that conclusion and judgment on the evidence “without any presumption in favor of the court below,” and, if we find error, to render such judgment in the cause as the court below should have rendered, or to reverse the judgment of the trial court and remand the cause for further proceedings, as to this court may seem right. Acts 1888–89, p. 800, § 7.

The action is on an account for goods sold. The appel-

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lant and one Vann were joined as defendants. Vann made default, and judgment went against him accordingly. Webb pleaded the general issue and the statute of frauds. The latter plea presented the real issue in the case. Under it the theory of the defense was, that Webb's promise to pay the amount to plaintiff was a promise to answer for the debt of Vann, and, not being in writing, was avoided by the terms of that statute as embodied in the Code, section 1732, sub-section 3. On the trial it was shown that both Webb and the plaintiff were timber dealers or manufacturers. Vann sent an order to Webb for certain lumber, which the latter did not have, and which was of a class not manufactured or dealt in by him. Webb was acquainted with Vann, had had dealings with and furnished him lumber before, and at this time there was an arrangement between them by the terms of which Webb was to supply Vann lumber in payment of the rent of a house which the former had leased from the latter and was occupying at a rental of twenty-five dollars per month. Some rent was due at the time of this transaction. Webb, not being able to fill the order, carried it to plaintiff for the purpose of having it filled by the latter. He had no authority to get the lumber from plaintiff and have it charged to Vann. When the order was presented to plaintiff with Webb's request that he fill it, plaintiff told Webb that he did not know Vann, and inquired if he was good. To this Webb replied in the affirmative. Plaintiff again stated that he did not know Vann, "and Webb then said he would guarantee the bill and pay for it." Plaintiff then shipped the lumber to Vann according to Webb's directions. The account was charged to Vann on plaintiff's books, and the bill was mailed to him. It was afterwards first presented to him for payment. "He said Webb would pay it, as there was an arrangement between Webb and himself by which Webb was to furnish him lumber in settlement for rent of a house. Plaintiff then saw Webb who said he was renting a house from Vann, and would make Vann pay the bill, and that Vann had bought the lumber from him. Plaintiff afterwards saw Webb and Vann together, and Webb repeated his statement that the bill should be paid." Plaintiff testified that he looked to both Vann and Webb for payment: and this is relieved from all doubt by the fact

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that he has sued them both, and recovered a judgment against both.

On the foregoing, which we find to be the facts of the case, though there is some conflict in the evidence, we of course cannot hesitate to declare that the credit upon which the lumber was sold was in some degree, at least, that of Vann, and that, unless there is something in the attitudes sustained to each other in this transaction by Webb and Vann to bring the case within an exception to the operation of the statute referred to, the debt was that of Vann, since he received the property which as between him and plaintiff constituted the sole consideration for the indebtedness, and Webb's promise was to answer for the debt of another within the terms of the statute, and hence voidable at his election because not in writing, expressing a consideration and signed by him; for the rule is that where any credit is extended to the party to whom the consideration moves—where he is looked to at all for payment though the other party may be in much greater degree relied on—the debt is his, and the other party's obligation is that of guarantor, which to be binding must be in writing.—8 Am. & Eng. Encyc. of Law, p. 674, n. 6, pp. 678–9 notes; *Foster v. Napier*, 74 Ala. 393; *Boykin v. Dohlonde*, 37 Ala. 577; *Marx v. Bell*, *Moore & Co.*, 48 Ala. 497; *Clark v. Jones & Brother*, 87 Ala. 474, 6 So. Rep. 362.

We do not think the facts in respect of the relations between Vann and Webb take the case out of the statute. Conceding that Webb was under some sort of obligation to supply lumber to Vann it does not appear that this transaction was intended as a performance of that obligation. On the contrary, the judgment rendered in this case against Vann demonstrates in a way to conclude the plaintiff on that point that Vann did not receive this lumber in payment of Webb's indebtedness to him, and that by its receipt that indebtedness was in no degree lessened, so that there is no accommodation in the case for the doctrine that a contract though in form to answer the debt of another is original and not within the statute when there is a valuable consideration for the special promise moving directly to the promissor.

Upon like considerations it is manifest that there is no merit in appellee's position that, as the testimony of

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Vann shows that Webb was without authority to make the purchase from plaintiff for him, he did not bind Vann thereby, but, on a familiar general rule, having acted as agent without authority to bind the person for whom he assumed to act, he bound himself as in an original and not collateral undertaking. This contention also is forever closed against the appellee by the judgment against Vann which is a conclusive determination that he was bound by the contract made for him with the plaintiff either because of original authorization to Webb, or because of subsequent efficacious ratification of Webb's acts.

We are, therefore, constrained to a different conclusion than that reached by the court below as to Webb's liability, and to hold that his promise was within the statute of frauds, and was avoided on the trial by his plea and the proof of it. The judgment of the circuit court is reversed, and a judgment will be here entered for the defendant Webb.

Reversed and rendered.

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Action on a Fire Insurance Policy.

1. *Fire insurance policy; limitations therein.*—The stipulation in a policy of insurance that the company "shall be liable only for such proportion of the whole loss as the insurance bears to the cash value of the whole property thereby insured at the time of the fire," and that "other concurrent insurance [is] permitted without notice until required," limits the insurance company's liability to the proportion the insurance bears to the cash value of the property at the time of the loss, without regard to the existence of concurrent insurance.

2. *Limitations in fire insurance policy; what not unreasonable.*—In an open fire insurance policy on cotton in a warehouse, the limitation that the company "shall be liable only for such proportion of the whole loss as the insurance bears to the cash value of the whole property thereby insured at the time of the fire," is not unreasonable or unjust, nor contrary to law or public policy.

3. *Plea of tender; error without injury.*—Although a plea of tender is
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defective in not averring that the defendant brought the money into court, the overruling of a demurrer to such defective plea by the trial court does not justify a reversal of the judgment, when another plea of tender to the same count of the complaint was in legal form and in all respects sufficient, and the evidence showed, without dispute, that the money was actually brought into court at the time both pleas were filed.

4. *Variance between replication and complaint.*—A replication to a plea can not set up a cause of action different from that declared on in the complaint; and when, in an action on an insurance policy the plaintiff declares on the policy as a valid, binding contract, he can not, by replication to defendant's pleas, avoid its conditions by allegations of fraud, which vitiate the contract.

5. *Pleadings; promise without consideration.*—It is a good and valid defense against an action on a stated account that the promise declared on in the complaint was wholly without consideration, and a plea which alleges facts showing this defense is not demurrable.

APPEAL from the Circuit Court of Tuscaloosa.

Tried before the HON. S. H. SPROTT.

This was an action brought by the appellant against the appellee to recover the amount due on a fire insurance policy, whereby the defendant insured the plaintiffs against all loss or damage by fire on certain cotton owned by the plaintiffs and stored in their warehouse.

The complaint contained three counts, as stated in the opinion. The defendant filed five pleas in answer to said complaint, the substance of which were as follows: No. 1, in answer to 1st count of complaint, admitted the execution of the policy alleged, and the liability of the defendant thereunder, and attaches the insurance policy as an exhibit, and makes the same a part of the plea, but denies that defendant is liable for the full amount claimed, but for a less amount, and tenders the amount admitted to be due. No. 2. "The defendant saith that this defendant tendered to the plaintiffs the amount due to him, to-wit, \$387. 21-100, before the action was commenced." No. 3, denies each and every allegation of the complaint. No. 4, denies each and every allegation of the second count of the complaint. No. 6, is as follows: "Comes the defendant and for further answer to the second count of plaintiffs' complaint says that if any account has been stated between plaintiffs and defendant, it was founded upon a mistake of law and of facts as to the measure of liability of defendant under a contract of insurance made by it with plaintiffs, a copy

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of which is hereto attached and marked 'Exhibit A' and made a part of this plea. Defendant avers that on to-wit, the 19th day of February, 1891, there were covered by said contract or policy of insurance forty bales of cotton of the aggregate value of seventeen hundred and forty-three 35-100 dollars; that on that day a fire destroyed a warehouse in which that cotton was contained, and seventeen bales of the forty were destroyed, and twenty-three bales were saved harmless; that the value of the said seventeen bales destroyed by fire was seven hundred and fifty 04-100 dollars; that the total liability of defendant for said loss under the terms of said contract was three hundred and eighty-seven 21-100 dollars; and any acknowledgment of liability beyond that amount on the part of this defendant, if such were made, was founded upon mistake as to the measure of its liability and without consideration.' The plaintiff filed six demurrers to these pleas; the first was addressed to the 1st and 3d pleas, because of inconsistency; one admitting the execution of policy and liability thereunder, and tendering the amount due, while the other denied the execution. The 2d demurrer was addressed to the 3d plea, and assigned as its ground that said plea denied the execution of a written instrument on which suit was brought, and is not sworn to. The 3d demurrer was addressed to the 1st plea, on the ground that it is not a sufficient plea of tender, in failing to aver that the amount had been always kept good from the time of making it. The 4th demurrer was also addressed to the 1st plea, on the ground, that the same was insufficient as a plea of tender, in failing to aver a tender of the full amount with interest. The 5th demurrer is addressed to the 6th plea, on the ground that it sets up an immaterial issue, and is an insufficient plea because it alleges that the settlement was made under a mistake of law. The 6th demurrer is addressed to the same plea, on the ground that it sets up the facts on which the settlement and compromise was made, and fails to allege that said facts were not true, or that there was any mistake as to the facts on which said settlement was made. The court overruled each of these demurrers; and plaintiffs then filed nine replications to said pleas.

The first replication was addressed to the 1st plea, and set up the fact that the insurance policy which was set

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forth in said plea did not contain and properly set forth the contract of insurance which plaintiff made with defendant, and on which the suit is brought; that the contract on which this suit was brought was for 20 bales of cotton, at \$45 per bale, in a certain warehouse, while that shown in the plea was different from this, and further, that since the making of the contract on which the suit was brought, defendant had changed said policy without plaintiffs' knowledge or consent, by pasting on to said contract a clause limiting the liability of defendant under said policy. The 2d replication was addressed to the same plea, and set up substantially the same facts as the first, with the additional facts, that defendant had stamped or written across and over said limiting clause, so pasted on the policy, the words, "Niagara Fire Insurance Co." in large red letters for the purpose of obscuring from plaintiffs said limiting clause, and that said letters did have the effect of obscuring said clause from plaintiffs, and prevented them from detecting or seeing said clause. The 3d replication is addressed to the same plea, and sets up the fact that, after the loss had occurred under said policy, the plaintiffs and defendant met for the purpose of adjusting and settling said loss, and that they did then adjust said loss and agreed on the amount defendant should pay under said policy, which amount defendant agreed to pay, and plaintiffs agreed to accept the same in full satisfaction of said claim, and that it was a greater amount than defendant now offers to pay. The 4th and 5th replications are substantially the same as the 3d, except they are in different language, and addressed to the 1st and 2d pleas. The 6th and 8th, went to the 1st and 2d pleas. They set out the facts and charge fraud on the part of defendants in altering and changing said insurance policy. The 7th replication, to 1st plea, sets up a waiver of said limiting clause by defendant, after the loss and after a full investigation of all the facts and circumstances, agreeing to pay a certain sum in settlement of the claim under the policy for the loss. The 9th replication, to said first plea, sets up the fact that said limiting clause under said contract, was, by its terms, only to apply in case of other insurance on the property destroyed, and that hence said clause had no application in this case. On motion of defendant each of said replications was stricken from the files,

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and plaintiffs forced to trial on said complaint and pleas.

The testimony for the plaintiffs tended to show that at the time they took out the policy of insurance, on which this action was founded, there were stored in the warehouse 20 bales of cotton; that when they went to the defendant's agent to get insurance they told him they wanted a "straight policy" on their cotton and that they never noticed the policy with the limitation clause pasted on the side of it until after the fire; that after the fire the agent of the defendant, who issued the policy, came to the plaintiffs' place of business with one Williams, whom he introduced as the agent of the defendant, who had come for the purpose of adjusting and settling the loss; that the plaintiffs came to an agreement with the said Williams, by which the company was to pay \$750 for the 17 bales of cotton; and that it was on this agreement and understanding the plaintiffs made out their proof of loss. On the other hand, the testimony for defendant tended to show that the said Williams was not its authorized agent to alter, change or modify the conditions of the policy; that he was simply an agent of the defendant's authorized agent, and employed by the defendant's agent; and that when the defendant's authorized agent went to the plaintiffs he told them that Williams had made a mistake, and that under the limitation clause, which is copied in the opinion, they were only entitled to \$387.21, which he tendered to plaintiffs, but this amount was refused. The defendants also showed that this amount was paid into court.

Upon the introduction of all the evidence, the court, at the request of the defendants, gave the following written charge to the jury: "If the jury believe the evidence they will find for the defendant upon the plea of tender." The plaintiffs duly excepted to the giving of this charge. There was judgment for the defendant; and the plaintiffs, on this appeal prosecuted by them, assign as error the rulings on the pleadings, the giving of the affirmative charge requested by defendant, and the judgment rendered.

WOOD & MAYFIELD and A. B. MCEACHIN, for appellants.—The second demurrer, which was addressed to the 3d plea, should have been sustained, since such plea in effect denied the execution of the policy, and should

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have been sworn to.—*Montg. & Mobile R. Co. v. Gilmer*, 85 Ala. 423, 5 So. Rep. 138; *Manning v. Maroney*, 87 Ala. 563, 6 So. Rep. 343; Code, §§ 2676, 2770; *Equitable Acc't Ins. Co. v. Osborn*, 90 Ala. 201, 9 So. Rep. 869. The 2d plea, which was the plea intended as a plea of tender, was fatally defective, on the grounds alleged in the demurrer, and the demurrer should have been sustained.—*Frank v. Pickens*, 69 Ala. 369; *Com. Fire Ins. Co. v. Allen*, 80 Ala. 571, 1 So. Rep. 202; *Marwell v. Moore*, 95 Ala. 166; *Alexander v. Caldwell*, 61 Ala. 543.

The demurrer to the 6th plea ought to have been sustained; that a settlement is made or money paid, under a mistake of law, is no defense to the action. All persons are conclusively presumed to know the law.—*Lesslie v. Richardson*, 60 Ala. 563; *Hemphill v. Moody*, 64 Ala. 468; *Haden v. Ware*, 15 Ala. 149; *Town Council v. Burnett*, 34 Ala. 400. One who solicits and writes insurance for a company is the general agent of the company, and may waive forfeitures and conditions in insurance policies, notwithstanding clauses in the policy, that no agent has such power.—*Mechem on Agency*, § 93; *Carrugi v. Atlantic Fire Ins. Co.*, 2 Amer. Rep. 567; 3 Amer. Rep. 76; *Ins. Co. v. Young*, 58 Ala. 477; 97 Amer. Dec. 383; 96 Amer. Dec. 83. When a loss has been adjusted and a promise made to pay the same, or even an acknowledgment by the insurer that a certain sum is due under the policy, that will support an action, and the amount agreed on can be recovered in a suit on the common counts as an account stated.—*Chitty's Pleadings*, Vol. 1, 358; *Phillip on Insurance*, § 1815; *Park on Insurance*, Vol. 1, 260; *Levy v. Peabody Ins. Co.*, 27 Amer. Rep. 598; *Farmers' & Merch. Ins. Co. v. Chestnut*, 50 Ill. 112; *Illinois Mut. Fire Ins. Co. v. Archdeacon*, 82 Ill. 236; s. c. 25 Amer. Rep. 313; *Stachie v. St. Paul Ins. Co.*, 35 Amer. Rep. 772.

HARGROVE & VANDEGRAAFF, *contra*.—Plaintiffs' first demurrer for misjoinder of defendant's pleas (1) and (3) was properly overruled for the reason that the alleged inconsistency assigned for cause does not exist. Plea No. (3) does not deny the execution of the policy.—*L. & N. R. Co. v. Trammell*, 93 Ala. 350, 9 So. Rep. 870; *A. G. S. R. R. Co. v. Frazier*, 93 Ala. 45, 9 So. Rep. 303. The demurrers to plea No. 6 were properly overruled. The

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first ground goes only to part of the plea, which alleges mistake not merely of law but of fact. Demurrer was not the proper remedy — *Kennon v. W. U. Tel. Co.*, 92 Ala. 399, 9 So. Rep. 200; *Ernst Bros. v. Hollis*, 86 Ala. 511, 5 So. Rep. 738. The making of the contract of insurance was wholly within the power of the parties, and the conditions imposed thereon were neither unjust nor inequitable.—*Wood on Fire Insurance*, (2d Ed.), §§ 40, 478; *Peoria M. & F. Ins. Co. v. Wilson*, 5 Minn. 53.

COLEMAN, J.—The action was to recover an amount claimed to be due upon a fire policy of insurance. The declaration consists of three counts; the first in the common form on the policy, averring the insurance of cotton, the destruction of seventeen bales, &c. by fire; the second count is upon an account stated, and the third, for money had and received. Several assignments of error are made upon the rulings of the court upon the pleadings, but we are of opinion that a few general principles will settle them all. To the first count there was a special plea, setting out the entire policy of insurance, one clause of which limited the extent of the liability of the insurance company, followed by an averment of facts which, if true, under the construction of the limiting clause contended for by the defendant, showed a certain amount to be due, and a plea of tender in legal form of this amount. A demurrer to this plea was overruled, the correctness of which ruling involves the construction of the limiting clause of the policy. It is as follows: "Ordinary form for open warehouses. On cotton in bales, their own, or held by them in trust, or on commission, or on joint account with others, or sold but not delivered, contained in McGee's warehouse, situated in North Port, Alabama. It is understood and agreed to be a condition of this insurance that this policy shall not apply to or cover any cotton which may, at the time of loss, be covered in whole or in part by or under the protection of any marine insurance, or policy of any marine company; and further, that this company shall be liable only for such proportion of the whole loss as the insurance bears to the cash value of the whole property hereby insured, at the time of the fire. Other concurrent insurance permitted without notice until required." The plea then averred that there were forty bales of cotton.

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ton in the warehouse covered by the policy at the time of the fire, that twenty-three bales were saved from the fire, and seventeen bales destroyed. It then averred the cash value of the whole property insured (forty bales), the value of the cotton destroyed (seventeen bales), and the tender of the amount of liability under the limitation clause. The demurrants contend that this clause can have no application where there are not concurrent policies issued, and there being none averred in the plea, the insurer is liable for the whole loss. The words used in the condition of the policy which we have quoted will not admit of this contention. It expressly stipulates against a liability for the whole loss in the event the value of the property covered by the policy exceeds the amount of the insurance, and says, "this company shall be liable only for such proportion of the whole loss as the insurance bears to the cash value of the whole property hereby insured at the time of the fire."

The insurance was for nine hundred dollars, the cash value of the whole property covered by the policy was averred to be \$1,743.35, the loss valued at \$750, the proportionate liability of the insurance company \$387.21, which amount was tendered and brought into court. There does not seem to be any difficulty or ambiguity about the construction of the limitation clause of the policy, or in ascertaining the proportionate liability. The insurance company was liable for a fraction over 51½ *per cent.* of the whole loss, and the insured for something less than 48½ *per cent.* We do not concur in the proposition, that the clause is unreasonable and unjust, and for this reason ought not be sustained. True, the amount of property which an open policy, or "blanket policy", as it is sometimes called, of this character could be made to cover, under some circumstances, might be so valuable, that a recovery for loss by fire would not be commensurate with the premium paid, but this condition can not occur except by the voluntary action of the insured. The amount of the insurance is nine hundred dollars. By not permitting the value of the property insured to exceed the amount of the insurance, the entire loss is recoverable. If the whole property insured had not exceeded nine hundred dollars, the entire loss would be recoverable under the provisions of the policy. The risk the insured carries, under the provisions of this

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policy, is increased in proportion as he increases the value of the property covered by the policy beyond the amount of the insurance, and the extent of the liability of the insurer is proportionately diminished. We know of no rule of law or public policy, which prohibits an insurance company from limiting the risk it will carry. Its premiums, in great part, are regulated by the amount of risk. If the insured had taken out a policy for eighteen hundred dollars, an amount equal in value to the whole property covered by the policy at the time of the fire, the company would have been liable for the whole of the loss. The demurrer was properly overruled.

The second plea to the first count, as a plea of tender, was defective in not averring "and now brings the money into court." We would not be justified in reversing this case because of this defective plea, when the first plea to the same count, was in legal form as a plea of tender, and the evidence shows, without dispute, that the money was actually paid into court, at the time of filing these pleas.

It is elementary that a replication to a plea can not set up a cause of action different from that declared on. The first count, declares upon a contract of insurance. To recover on this count the plaintiff is required to prove a valid, subsisting contract. The facts averred in one of the replications, if true, stamps the contract as fraudulent and void as to plaintiff. The plaintiff can not count on the contract for a recovery, as a valid contract, and by replication to defendant's plea avoid its provisions for fraud. He sues *ex contractu*, his replication shows a tort.—*Winter v. Mobile Savings Bank*, 54 Ala. 174; 1 Chitty Pl., 643; *McAden v. Gibson*, 5 Ala. 341. The court did not err in its rulings upon the plaintiffs' replications to the pleas of the defendant to the first count of the complaint.

To the second count of the complaint, that which counted upon a stated account, the defendant pleaded two pleas, the first the general issue, and the second a special plea. Under the evidence in this case and that proposed to be proven by plaintiff, the second count was not made out, and the plaintiff failed upon the general issue. We do not understand the special plea to the second count, as bearing the construction contended

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for by plaintiff. True the plea says if any promise to pay was made, it was made upon a mistake of law and fact, and if the plea had stopped here it would be subject to criticism, but this conclusion is followed by a statement of facts, which, if true, brings the defense clearly within the principle declared in *Ernst Bros. v. Hollis*, 86 Ala. 511, 5 So. Rep. 738. A promise to pay a claim which is absolutely without merit, and not based on colorable right, and the promisee surrenders nothing and is not injured, can not support an action either at law or equity.—*Prince v. Prince*, 67 Ala. 565; *Prater v. Miller*, 25 Ala. 320. The *gravamen* of this plea is, that if any promise or agreement to pay was made by a competent agent, it was without consideration to support it. The facts averred sustain this conclusion of the plea.

It is clear to our minds that the amount tendered and paid into court by the defendant was the full measure of the recovery plaintiff was entitled to; and as there was no dispute of the facts upon these issues, the court did not err in its instructions to the jury.

Affirmed.

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Application for Mandamus.

1. *Act to pay solicitors' salaries; counties' right to surplus in the state treasury.*—Under the provisions of the "act to pay solicitors' salaries," approved February 28, 1887, (Acts 1886-87, p. 161), there must be annual adjustments and ascertainment of the surpluses of solicitors' fees paid into the state treasury over and above the salaries of solicitors, by deducting the aggregate of the salaries of solicitors from the aggregate of all solicitors' fees paid into the state treasury during the preceding year, from whatever source derived; and each county is then entitled to receive its proportionate share in the remainder.

2. *Same; computation without regard to judicial circuits or act of February 25, 1889.*—Such annual adjustments and ascertainment must be made without regard to the judicial circuits, and are unaffected by the act approved February 25, 1889, (Acts 1888-89, p. 55), providing for payments out of the state treasury of the costs in cases

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where the defendants are sentenced to imprisonment in the penitentiary.

3. *Mandamus, to compel auditor to draw warrant for counties' shares of surpluses in state treasury from solicitors' fees.*—After adjustment and ascertainment of the surplus of solicitors' fees in the state treasury, over and above the salaries paid solicitors, as provided by act of February 28, 1887, (Acts 1886-87, p. 161), the auditor must draw his warrants on the treasurer in favor of the counties, respectively, for the several sums ascertained to be due them; and upon his refusal to do so, he may be compelled thereto by *mandamus*.

APPEAL from the City Court of Montgomery.

Heard before the Hon THOS. M. ARRINGTON.

The appellee, W. D. Andrews, as treasurer of Barbour county, filed his petition, addressed to the judge of the city court of Montgomery, praying for a writ of *mandamus* to compel the appellant, John Purifoy, as Auditor of the State of Alabama, to draw his warrant on the state treasurer, in favor of the petitioner for the sum of \$2,417.29, the amount alleged to be due to the county of Barbour out of the surplus money alleged to be in the state treasury, arising from solicitors' fees which accrued during the years 1889, 1890, 1891 and up to September 30, 1892, after paying the solicitors' salaries during that time.

The petition alleged that according to the report of the Auditor for the year ending September 30, 1892, there was in the state treasury, after paying the solicitors and their assistants, a surplus amounting to \$39,533.86; that \$8,002.58 of said sum arose from fees paid into the treasury from the several counties composing the third judicial circuit, and that of said sum the county of Barbour was entitled to have returned or paid to it the sum of \$2,417.29. The alleged right to the fund in question, on the part of the appellee, is based on the act approved February 28, 1887, to pay salaries to solicitors instead of the fees which they earned, and to require their fees paid into the state treasury. (Acts 1886-87, p. 161.)

To the petition the Auditor filed his answer denying that his report showed any amount of surplus money in the state treasury after paying the salaries of solicitors, and pointing out that the matter shown by said report was only an amount of solicitors' fees retained in the state treasury, under the provisions of the act of Feb-

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ruary 25, 1889, to provide for the payment of costs of conviction in cases where defendants are sentenced to the penitentiary. (Acts 1888-89, p. 55.)

The auditor then, as part of his answer, filed certain tabulated statements showing, as he avers, the true state of the fund arising from solicitors' fees paid into the state treasury, and retained in the treasury under the act aforesaid, for the time in question, to-wit: 1. A statement showing the amount of solicitors' fees collected and paid into the state treasury, from each county, in each circuit, for each of the years 1887 to 1892, inclusive; the total amount so collected and paid in from each of said counties during said years, and the total amount so collected and paid in from the entire State during the same time. 2d. A statement showing the amount of solicitors' fees retained in the state treasury, under the provisions of the act of February 25, 1889, aforesaid, by circuits and counties for each of said years, the aggregate so retained from each circuit, and for the entire State, amounting to \$39,326.16. 3. A statement showing the amount of salaries paid to solicitors from the first day of August, 1887, when the salary system went into effect, to the 30th of September, 1892. 4. A statement showing the amount of said fees collected and paid in from each judicial circuit, and from the county of Montgomery. Also, a statement showing the amount retained under the act of February 25, 1889, aforesaid, as to each circuit and Montgomery county. 5. A statement showing the amount of salary paid to the solicitor of each circuit and the county of Montgomery for the time in question.

The Auditor further alleges that after paying the salaries of the several solicitors, from the time the salary system went into operation to the close of the fiscal year, September 30, 1892, there is no surplus money in the state treasury arising from solicitors' fees collected and paid in under the provisions of the act of February 28, 1887, to pay salaries to solicitors, etc., but that there is a deficit of \$25,649.35; but if the said sum of \$39,326.16 of fees retained in the treasury under the act of February 25, 1889 is to be considered, and if said sum is to be included within the contemplation of the act of February 28, 1887, aforesaid, then and in that event there

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would be a surplus of fees above salaries paid for the time in question, amounting to \$13,676.81, and in that event, and if the law authorized the payment of such surplus back to the counties in proportion to the amounts severally paid into the treasury by them, including said fees retained, there would be a surplus of \$379.88 due to the county of Barbour, and no more.

But the Auditor insists that the fees retained in the state treasury as aforesaid constitute no part of the fees collected and paid into the treasury as contemplated by the act of February 28, 1887; that said act does not in any event authorize him to draw his warrant on the treasurer for any surplus that may remain in the treasury after paying the salaries of solicitors; that said act fixes no time when such surplus shall be paid, fixes no rule by which the same shall be ascertained, and makes no appropriation of the money in the treasury to pay any warrant which respondent might draw on such surplus, and that said act is nugatory, and can not be carried out without further legislation.

The several tabulated statements referred to were admitted as true. Upon the hearing of the cause, the judge of the city court granted the writ of *mandamus*, commanding the Auditor to draw his warrant in favor of the appellee on the state treasurer for the amount of \$379.88. The respondent brings this appeal, and assigns this judgment and order as error.

W. L. MARTIN, Attorney General, for appellant.—The fees referred to in the act, a surplus of which after paying salaries was to be returned to the counties, are fees collected from defendants and paid into the treasury, and fees collected from the hire of county convicts and paid into the treasury. The fees which are taxed against defendants in penitentiary cases but not collected and paid into the treasury are not to be considered. Although in penitentiary cases the State advances the costs of conviction—deducting the solicitors' fees if earned by a salaried solicitor—the costs are not paid; they remain a charge against the defendant, to be collected by execution. "The solicitor's fee is, therefore, never in the treasury until it is collected by the clerk from the defendant, and by the clerk paid in."—*Hogue v. Matthews*, 89 Ala. 308, 8 So. Rep. 241; Acts 1888–89, pp. 55, 91. The

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statute must be liberally construed in the interest of the State.—*Pollard v. Brewer*, 59 Ala. 130; *Skinner v. Dawson*, 87 Ala. 348, 6 So. Rep. 428.

LEE & LEE and MOORE & FINLEY, *contra*.—Under the provisions of the act approved February 28, 1887 (Acts 1886–87, p. 161), after the solicitors and their assistants have respectively been paid the amounts therein provided for them, the surpluses shall be paid into the fine and forfeiture fund of the respective counties in direct proportion to the amounts received from the counties respectively; and the act is a legislative enactment and appropriation of the amounts ascertained to be due to the fine and forfeiture fund of the counties, now retained in the state treasury, and is authority to the Auditor to draw his warrant for that sum in favor of the county treasurers of the several counties.—17 Ala. 527; *Chisholm v. McGehee*, 41 Ala. 192; *Reynolds v. Taylor*, 43 Ala. 420; *Commissioners Court of Mobile v. Turner*, 45 Ala. 199; *Weaver v. Brewer*, 61 Ala. 318; *Smith v. Speed*, 50 Ala. 276; 31 La. Ann. 142; (*State v. Jumel*); *State v. Kenney*, 9 Mont. 389; *Carr v. State*, 127 Ind. 204; *Evans v. McCarthy*, 42 Kan. 426; *State v. Holladay*, 65 Mo. 76; *Rice v. State*, 95 Ind. 33.

Mandamus will lie to compel an officer to audit a claim or perform a duty imposed by law.—14 Amer. & Eng. Encyc. of Law, p. 145, § 4; *State v. Gates*, 22 Wis. 210; *State v. Secretary of State*, 33 Mo. 293; *Burkhart v. Reid*, (Idaho) 22 Pac. Rep. 1; *Isle Royal Land Co. v. Secretary of State*, 76 Mich. 162; *State v. Doyle*, 38 Wis. 92.

The only reasonable construction that can be given to the above act is that the solicitors' salaries of the circuit must be paid out of the convictions which have been obtained in the various counties in the circuit. After this is done, if there is a remainder left in the state treasury, above the amount required to pay the solicitor's salary of the circuit, then the remainder must be distributed among the counties of said circuit in proportion to the amount that each county paid in.

HEAD, J.—The act approved February 28, 1887, entitled "An act to pay solicitors' salaries instead of the fees, which they now receive, and to require said fees to be paid into the state treasury," (Acts 1886–87, p. 161),

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which act took effect August 1, 1887, requires all solicitors' fees collected by any officer, and all such fees collected from convicts thereafter convicted and confined at hard labor for any county, to be paid into the state treasury. The act also provides that solicitors shall be paid an annual salary of \$3,000. Solicitors' fees accruing in county courts are required to be paid into the county treasuries, respectively; and salaries of assistant solicitors, payable out of the county treasuries are prescribed. The act also provides, "That the surplus money paid into the state treasury and county treasuries under the provisions of this act, after the solicitors and their assistants have respectively been paid the amounts herein provided for them, shall be paid into the fine and forfeiture fund of the respective counties in direct proportion to the amount received from the counties respectively." On February 25, 1889, an act was passed (Acts 1888-89, p. 55) requiring the State to pay out of the treasury the costs (not to exceed \$150 in any case) in all cases where the defendants were sentenced to imprisonment in the penitentiary; and by the same act it was provided that no contractor or person hiring state convicts shall pay costs to any clerk. Prior to this act, and subsequent to the act of February 28, 1887, all solicitors' fees were collectible by the clerks, and by them, when collected, paid into the state treasury, save as to fees in the county courts which they paid into the county treasuries; and this continued to be the case after February 25, 1889, except that the clerks were powerless to collect the fees accruing in cases where defendants were sentenced to the penitentiary.

We think the act entitled "An act to pay solicitors' salaries" &c., which went into effect August 1, 1887, contemplates annual adjustments and ascertainment of the surpluses of fees over and above the salaries of solicitors, and that all solicitors' fees covered into the state treasury, during the preceding year, from whatever source derived, are to be taken into the adjustment; and each county is then entitled to receive its proportionate share of all such fees ascertained after deduction of the amounts of solicitors' salaries for that year.

We find no provision for the application of solicitors' fees, received into the treasury, or any class of such fees, to the State's reimbursement, for costs paid out of the

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treasury, under the act of February 25, 1889. Those costs are payable out of the treasury generally, and no special revenue is created out of solicitors' fees, or otherwise, for their reimbursement; but the statute is plain that all such fees received into the treasury, after paying the solicitors' salaries, shall be paid to the counties. Manifestly, fees charged up to the clerks, under the act to regulate the payment and collection of solicitors' fees into the state treasury, approved February 28, 1889, (Acts 1888-89, p. 91), but not actually paid into the state treasury at the time of the annual adjustment, do not enter into that adjustment.

But, there is no room for the contention, in any of the statutory provisions to which our attention has been called, that the adjustment and ascertainment of surpluses shall be made by judicial circuits. No such purpose is expressed, and no reason shown why it should be so inferred. On the contrary, the intent is most obvious that they should be made with reference to the whole State—all the counties thereof; the aggregate of all the salaries of solicitors to be deducted from the aggregate of all solicitors' fees received during the year into the state treasury; the proportionate share of each county in the remainder to be computed and paid over to it.

The agreed facts show that, under the principles above announced, Barbour county is entitled to \$379.88. We think the statute contemplates that the Auditor shall draw his warrants on the Treasurer, in favor of the counties, respectively, for the sum ascertained to be due them, and that, on refusal, he may be compelled thereto by *mandamus*. The conclusion of the city court was in accordance with our views, and its judgment is affirmed.

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Bill in Equity to Enjoin Sale of Land for Taxes.

1. *Appeal; decree discharging injunction.*—An appeal does not lie from a decree of a chancellor rendered in vacation discharging an injunction.

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2. *Same; what considered when no answer filed to a bill for an injunction, and no grounds for the dissolution are given.*—On an appeal from a decree dissolving an injunction, and the grounds upon which the writ are dissolved are not stated, and there was no answer filed to the bill seeking the injunction, the consideration will be confined to the pleadings of the bill as they appear upon its face.

3. *Taxes; redemption by delinquent payer from purchaser at tax sale.*—Where lands sold for unpaid taxes are redeemed from the purchaser by the delinquent tax payer, they again become subject to the lien for taxes which were delinquent prior to said sale, although as to the purchaser, such sale conferred upon him a clear legal title in fee simple.

4. *Sale of property for taxes; when purchase made in interest of delinquent owner.*—After the rendition of a decree ordering the lands of W. to be sold for the payment of city taxes delinquent prior to 1884, the lands were sold for taxes for the year 1884, accruing subsequently to the taxes embraced in the decree, and bought by T. T. having made default as to the State and county taxes while apparent owner, the lands were again sold, and purchased by the State, and afterwards sold to F. as the grantee of T. W., after redeeming from T., who had purchased as her agent, also redeemed from the heirs of F. *Held*, that the purchase of F. was for the benefit of W., the original owner, and that his title, being built on the defaults of the original owner and her agent, could not free the lands from the lien of the decree ordering the sale of the lands for delinquent city taxes, which accrued prior to 1884.

APPEAL from the Chancery Court of Montgomery.

Heard before the Hon. JERE N. WILLIAMS.

The bill in this case was filed by the appellant in the chancery court of Montgomery county, on the 5th day of June, 1893, against the City Council of Montgomery, to restrain the collection of taxes on real estate of the complainant by said city.

It alleges, that she is a married woman, and, prior to the year 1887, was the owner of real property in the city of Montgomery, which is described in the bill; that prior to the year 1887, said property was sold for taxes by the tax collector of Montgomery county, and was purchased by him in the name and for the State of Alabama; that afterwards, on the 24th of February, 1888, the Auditor of the State sold said lands to Charles L. Flint, and conveyed to him all the right, title and interest of the State in the same, as shown by his deed attached to the bill. Said deed, after reciting the purchase by the State of said lands, and that "Charles L. Flint, grantee

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of the party who owned said lands at the time of said sale, did on the 24th February, 1888, make application to the Auditor of the State to have the tax collector of said county assess the value of said lands, and the taxes on the same for each year between the date of the sale of said lands and the date of said application," and said requirement having been complied with, as provided for by the act of February 28, 1887, concluded as follows: "Now, therefore, I, M. C. Burke, as Auditor of the State of Alabama, in consideration of the premises, and by virtue of the provisions of the act of February, 1887, for the relief of parties whose lands have been sold for taxes, do hereby grant, bargain, sell, alien and convey unto the said Charles L. Flint all the right, title and interest of the State in and to the following described lands,"—describing them. It is further averred in said bill that, prior to the 19th day of February, 1891, said Flint departed this life, and on that date complainant purchased from his widow and his only heirs, who were adults, all the right, title and interest of the said Flint at the time of his death, as acquired by him by his said purchase from the State. Their deed is exhibited to the bill, and purports, in consideration of \$1,192.66, to rescind, release and quit-claim to the complainant all their right, title and interest in said lands which had been acquired by the said Flint under and by his deed from said Auditor. Complainant further alleged that about the 1st January, 1884, the City Council of Montgomery filed their bill in the said chancery court of Montgomery against complainant to enforce the collection of taxes alleged to be due to it from complainant on said property, accruing between the years 1873 and 1882, inclusive, and that under said bill, said court, in August, 1884, rendered a decree in that behalf for taxes due before that year, on said lands described in the bill, for the payment of the same, and ordered their sale, if said decree was not paid as directed; that afterwards, in October, 1885, the city recorder of Montgomery ordered said lots to be sold for taxes due and unpaid to the city for the year 1884, accruing subsequently to the taxes embraced and included in said decree of August, 1884; and on the 30th of November, 1885, the clerk of said city council advertised and sold the same, and Sallie G. Thorington became the purchaser thereof, paying the

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taxes assessed against them for 1884, and all interest, charges and costs claimed in that proceeding; and said clerk gave to her certificates of purchase, as the statute required, and thereby cut off and destroyed all liens and rights held by said City Council of Montgomery for taxes claimed to be due and delinquent before that time.

It is further alleged by complainant, "that as an act of precaution, and to remove all seeming or actual cloud from her title to said land, in so far as the same was created by the said sale of the City Council of Montgomery to Sallie G. Thorington, she has redeemed the same from said Thorington and now holds the same under her said purchase of all the rights, title and interest of the State of Alabama, through Charles L. Flint by deed as aforesaid from his heirs and devisees, freed from all the taxes, costs and charges now attempted to be set up and enforced by said City Council of Montgomery as aforesaid. Yet, notwithstanding the settlement of said decree of August, 1884, aforesaid, in the manner hereinbefore stated, said City Council of Montgomery is now attempting to enforce and collect the said decree, and has advertised the said property to be sold, for the payment of said decree, on the 5th day of June, 1893."

The bill prayed for a temporary injunction against the execution of said decree, that it be annulled and declared to be of no effect, and that on the final hearing of the cause, the injunction be perpetuated.

From the record it appears, that the bill was sworn to by J. S. Winter before Hon. Jas. J. Banks, judge of the 10th judicial circuit, on the 2d of June, 1893. It further appears he issued his *fiat*, granting the injunction prayed for, on "complainant entering into bond in the sum of \$300, payable as provided by law;" and the bill was filed on the 5th June, 1893, at 11:05 o'clock a. m. The bond was also executed and the injunction issued on that date. On June 17th, 1893, in vacation, the defendant moved the court to discharge and dissolve said injunction, but on what grounds does not appear. On the same day, the complainant having had due notice, the chancellor, at chambers, ordered and decreed that the injunction be discharged, "as having been allowed improperly, in an improper case;" and further decreed that said injunction be dissolved. From this decree the complainant appeals to this court, and assigns as error

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the decree discharging and dissolving said injunction.

FARNHAM & CRUM, for appellants, cited *Thorington v. City Council of Montgomery*, 82 Ala. 591, 2 So. Rep. 513; 88 Ala. 548, 7 So. Rep. 363; *Winter v. City Council*, 79 Ala. 481; Burr. on Taxation, 347-8; 2 Desty Taxation, 849; Blackwell on Tax Titles, 516; Id., 2d Ed., § 427; *Jones v. Randle*, 68 Ala. 258; *East & West R. R. Co. v. East Tenn. V. & Ga. R. R. Co.*, 75 Ala. 275; *Chambers v. Ala. Iron Co.*, 67 Ala. 353.

BRICKELL, SEMPLE & GUNTER. *contra.*

HARALSON, J.—In the case of *Ex parte Sayre*, 95 Ala. 288, 12 So. Rep. 378, we held that an appeal does not lie from an order of a chancellor made in vacation discharging an injunction. According to that ruling, this case is not before us on appeal from the order discharging the injunction.

The decree of the chancellor, however, not only discharges but dissolves the injunction which had been granted. Its language is, "Upon consideration thereof, * * it is now here ordered and decreed that the said injunction be and the same is hereby discharged, as having been allowed improperly and in an improper case, and it is further ordered, that said injunction also be, and the same is, hereby dissolved." The grounds upon which he dissolved the writ are not stated. Motions to dissolve proceed necessarily, on the one or the other, or both of two grounds—either for want of equity, or on the coming in of the answer under oath, denying the allegations of the bill, on which its equity rests.—Code, § 3532; *E. & W. R. R. Co. v. E. T. Va. & Ga. R. R. Co.*, 75 Ala. 275. There was no answer filed here, and the consideration of the appeal must, therefore, be confined to the equities of the bill as appear on its face.

Coming to the legal principles upon which the question at issue is to be determined, we find little or no disagreement in the text books and adjudicated cases. Mr. Black, supported by a long array of adjudications from many of the States, lays it down, that any person who owes a duty to the State to pay the taxes on a particular tract of land, can not become a purchaser at the sale of the property for such taxes; or, if he should, in form,

buy at such a sale, he does not thereby acquire any right or title to the property better or stronger than what he had before, but his purchase is deemed merely as a mode of paying the taxes, and leaves the title in precisely the position it would have occupied if the payment had been made before, instead of after the land had been put up for sale. So he proceeds: "One who has permitted lots which he holds, to be sold for taxes and purchased by his agent, and who has obtained from the latter a transfer of the certificate of purchase, after the agent has been reimbursed the amount paid upon his bid, by collecting the rents"—or, he might have added, by being repaid such amount in money, by way of redemption of the title—"and has procured from him the tax deeds, for the purpose of strengthening his title to the lots, does not thereby acquire a better title by the tax deeds."—Black on Tax Titles, § 273, and authorities cited; Blackwell on Tax Titles, §§ 566, 581.

~ It is everywhere conceded to be a legal and a moral duty every good citizen owes the State and the municipality in which he resides, to pay the taxes which are duly and legally assessed against his property. Without this, good government and a due administration of law, in which every one is alike interested, can not be maintained and enforced. The disqualification of one to purchase land at a tax sale, sold for the purpose of collecting the taxes assessed against it, rests upon the principle that he is under a legal and moral duty to pay the taxes. If he can not do this directly, by becoming himself the bidder at the sale, he ought not to be allowed, and can not be, to acquire a valid title indirectly, by procuring another person to do for him what he can not do for himself—to act as the ostensible bidder at the sale, take the certificate of purchase and the tax collector's deed, and assign the title afterwards to the owner on his refunding the money and expenses, and thereby derive any advantage. Such an arrangement, as has been held, if not positively fraudulent, is, at any rate, an attempt to evade the law, to which courts will not lend their countenance. The principle running through all the cases, says Mr. Burroughs, "is that when it is the duty of a party to pay the taxes, he can not acquire a title founded on his own default. * * He can not build a title on his own neglect of duty." In every such instance,

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the owner will be construed as intending to discharge his duty by relieving the estate from the incumbrances, by extinguishing a title under a sale his own tardiness and neglect of duty had made necessary.—Burroughs on Tax., 352-354; Black on Tax Titles, § 276; *Donnor v. Quartemas*, 90 Ala. 169, 8 So. Rep. 715; *Thorington v. City Council*, 88 Ala. 548, 7 So. Rep. 363; *Bailey v. Campbell*, 82 Ala. 345, 2 So. Rep. 646; *Jackson v. King*, 82 Ala. 433, 3 So. Rep. 232; *Johnson v. Smith*, 70 Ala. 108; *Frank v. Arnold*, 73 Iowa 370; *Lindley v. Snell*, 80 Iowa 103; *Varney v. Stephens*, 22 Me. 334.

The complainant, in filing this bill, relies on the principle, that whenever lands are properly sold for unpaid taxes imposed on the lands themselves, the purchaser acquires the fee, (*Jones v. Randle*, 68 Ala. 258; Bur. on Tax., § 122); that a sale of such lands frees them in the hands of the purchaser from any and all liens thereon for delinquent taxes for former years.—2 Desty Taxation, 849; *Thorington v. City Council*, *supra*. In the case last cited, it was held that a sale of land for unpaid taxes destroys the lien for prior unpaid taxes, of which no notice was given at the sale, and confers a clear title on the purchaser, if he bought in good faith, for his own benefit, and with his own money and not by fraud or collusion with the delinquent tax payer; but, if the lands are redeemed by the delinquent, they again become subject to the lien for prior taxes. Let us then apply these principles to the facts of this case, as we find them averred in this bill.

For a better understanding of the law and the facts, it is proper to refer to two acts of the legislature, which have an important bearing; the one, entitled, "An act to regulate the sale of real estate for unpaid municipal taxes in the city of Montgomery," approved February 17, 1885, (Acts 1884-85, p. 767), the 12th section of which provides, "that the certificate of the purchaser under this act, shall authorize the purchaser, or his assignee, to enter upon and maintain ejectment for the possession of the premises sold against the former owner; * * * and the owner * * * may redeem the same on the terms and conditions prescribed in section nine [of said act] at any time within two years from the time the purchaser enters upon or obtains possession of the property." The other is an act "For the relief of

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parties whose lands have been sold for taxes," approved Feby. 28, 1887 (Acts 1886-87, p. 91), which provides that, in all cases where lands have been sold for the non-payment of taxes and purchased by the State, and when the title has never passed out of the State, the parties who own said lands at the date of such purchase by the State, or their grantees or assignees, shall be permitted to redeem said lands at any time within one year after the passage of the act, upon the payment of the taxes due at the date of said sale, and the expenses of said sale, and the annual taxes from the date of said sale to the date of the redemption of said lands; that any person desiring to redeem lands under the provisions of the act shall make application in writing therefor to the Auditor of the State, and by complying with the terms prescribed therein, that the Auditor shall make a deed to said lands, conveying all the right, title and interest of the State in and to the same to the party purchasing.

The case, on its naked presentation of facts in the bill, is, that complainant in the years from 1873 to 1885 was the owner of the lands described in the bill, and had failed for all these years to pay her taxes to the city of Montgomery. A bill was filed against her by said city in the chancery court of Montgomery, to have a lien declared on said lands for the payment of said unpaid taxes on them; that said court, by its decree, declared a lien on said lands and ordered their sale, if said decree was not paid as directed; that the recorder of the city of Montgomery, proceeding, as we must presume, under said act regulating sales of real estate for unpaid municipal taxes of the city of Montgomery, ordered said lands sold for the taxes due the city for the year 1894, accruing subsequently to the taxes embraced in the decree of said chancery court, at which sale, Sallie G. Thorington became the purchaser, for the amount of the taxes, costs and expenses. and received from the clerk of the city certificates of purchase of the respective lots which were sold. This sale and purchase, it is claimed, cut off and destroyed all liens and rights held by said city for taxes claimed to be due and delinquent before that time, which were included in said decree. Under the principles above referred to, the sale might have had the effect claimed for it; but unfortunately for such a claim,

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it is stated in the bill that complainant *has since redeemed said lands from Mrs. Thorington*, which redemption, we hold, was but the discharge by complainant, of a legal and moral duty, and had the effect, to relieve the estate from Mrs. Thorington's title, if it ever existed, by extinguishing her title under that sale, and subjecting the lands to the claim of the city for all of said delinquent taxes. The case stands, therefore, as if Mrs. Thorington had never bid for and received a certificate of purchase and deed from the city to said lands, and the complainant, as to this claim, is remanded to her former relations to the lands. The statements of the bill authorize the inference and indulgence of the fact that Mrs. Thorington was procured to figure in the transaction, as the agent of the complainant.

As to the sale by the Auditor to said Flint, it may be said, on the averments of the bill, that his purchase was in the interest and for the benefit of complainant. He acted as the grantee, certainly, of Mrs. Thorington; for, while the bill fails, in terms, to state the date of complainant's redemption from her, it does state, that she "has redeemed the same [said lands] from said Thorington, and now holds the same under her said purchase of all the right, title and interest of the State of Alabama, through Charles L. Flint by deed as aforesaid from his heirs and devisees, freed from all the taxes, costs and charges now attempted to be set up and enforced by said City Council."

Complainant, then, by refusal to pay her taxes necessitated a sale by the city. Mrs. Thorington, as her agent and for her benefit, bid at said sale, and received complainant's title, which was afterwards redeemed by complainant. While Mrs. Thorington was the apparent owner, *she* made default in the payment of the accruing taxes on said lands to the State and county, and forced the State to sell them for the delinquent taxes, and after this, having gone through the form of a redemption from Mrs. Thorington, complainant redeemed the land from the heirs of Flint, and now claims that she holds them freed from all the taxes of the city from 1873 to 1891, except for such as accrued in the year 1884. Flint's purchase, under the facts stated, we must hold, was in the interest and for the benefit of complainant. His title was built on the defaults of complainant and her

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agent, Mrs. Thorington, and can not be made to subserve the purposes for which it was intended—that of freeing these lands from the just claims of the city on them for its taxes. A chancery court will look through the forms with which the transactions may be clothed, to their real substance, and to the intention of the parties, and will not willingly allow wrong and injustice to prevail.

The acts of the legislature, to which we have referred, allow the purchaser, in each instance, to take possession and control of the property purchased. So far as we are informed by the bill, Mrs. Thorington never took possession of said lands from complainant under the purchase, nor did said Flint take possession of them, but complainant has remained in possession all the while. While these facts, if not true, are amendable defects, and would not, of themselves be allowed to determine the equities of the bill on this appeal, yet, taken in connection with the other facts averred, they serve to strengthen the conclusion we reach.

There was no error in the decree of the chancellor dissolving the injunction, and it is affirmed.

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Statutory Action of Ejectment.

1. *Infants; ratification after attaining majority.*—A contract by an infant, being merely voidable and not void by reason of the infancy, is subject to ratification after attaining majority, and any declarations or acts by the infant, after arriving at full age, that clearly recognize the existence of the contract as a binding obligation, will constitute a ratification, although at the time of the declaration made or the act done the infant did not know that he or she had a right to avoid the contract.

2. *Execution of mortgage by infant; ratification by payment of interest notes.*—Where a mortgage is executed by an infant as security for money loaned, the payment, after arriving at full age, of the interest notes as they mature, is a ratification of the voidable contract, which thereafter becomes a binding obligation.

APPEAL from the City Court of Gadsden.
Tried before the Hon. JOHN H. DISQUE.

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This was a statutory real action in the nature of ejectment, brought by the appellant against the appellee. The title to the property involved in this suit was derived from a mortgage, which was executed by the defendant to the plaintiff, to secure a note given for money loaned by the plaintiff to the defendant payable five years after date, and also to secure the payment of the interest coupons on said debt which were payable annually. The facts of the case are sufficiently stated in the opinion.

The cause was tried without the intervention of a jury, and upon hearing all the evidence, the court rendered judgment for the defendant; and from this judgment plaintiff appeals, and assigns the rendition thereof as error.

CALDWELL BRADSHAW and LOMAX PITTMAN, for appellants, cited *Morse v. Wheeler*, 4 Allen 570; *Anderson v. Soward*, 40 Ohio 325; *Clark v. Van Court*, 100 Ind. 113; *Taft v. Sergeant*, 18 Barb. 320; *Ring v. Jamison*, 66 Mo. 424.

DORTCH & MARTIN, *contra*.

STONE, C. J.—Mrs. Wright, *nee* Griffin, as the uncontroverted testimony shows, was born June 17, 1864. She executed the mortgage, the title on which the present suit was sought to be maintained, and the notes it was given to secure March 12, 1885—three months and a few days before she attained her majority. The defense relied on was infancy, and it was sought to escape its force by replying that, after she became of age, she ratified the act, and made it binding. The question was ratification *vel non*. We say this was the question, because the testimony adduced proves it. Neither the plea nor the ratification is shown in the pleadings. It is desirable that such issue as this should be distinctly presented.

The notes and mortgage were given to secure the repayment of money borrowed. The loan was on five years time, and one note was given for the principal, made payable at the end of five years. Coupon interest notes were given, payable yearly. The last interest coupon matured March 12, 1890. All the notes were secured by the mortgage. The mortgagor paid the interest for the

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first four years on the maturity of the several coupons, but refused to pay the principal and the fifth coupon. Thereupon the present suit was instituted.

The defendant, Mrs. Wright, testified "that she paid the plaintiff all of the coupons mentioned in the mortgage as they matured, with the exception of the one maturing on the 12th day of March, 1890, introduced in evidence by plaintiff. That she did not know until January, 1890, when she was so informed by a lawyer, that the mortgage was invalid, and that she could avoid the payment of it, because she was a minor when the same was executed; and that after she learned that, she decided not to pay, and never paid anything after she knew she was not bound by the contract." Plaintiff objected to that part of the testimony of this witness, in which she stated her want of knowledge of the result of her acts in making payments on said debt until January, 1890; the objection was overruled, and an exception reserved. The court gave judgment for defendant, and plaintiff excepted.

The contract being entered into by Mrs. Wright before she was 21 years old, the question arises, was her want of knowledge that she had power to repudiate the obligation a sufficient excuse for the payments of interest on the loan, which she testifies she made? Does her ignorance of her legal right to renounce the contract on attaining her majority, arm her with the power to exercise that right whenever she is informed she possesses it, and this, notwithstanding any acts she may have done, pointing to ratification, anterior to receiving such information?

There are decisions which answer this inquiry in the affirmative; and this court, in *Flexer & Lichten v. Dickerson*, 72 Ala. 318, speaking of ratification of a contract entered into during infancy, said it could be done "only by an express confirmation, or new promise voluntarily and deliberately made, by the infant upon coming of age, and with knowledge that he is not legally liable." We suppose this decision had a material bearing in the decision of the case we have in hand. The assertion that to be binding the act claimed as ratification must be done "with knowledge that he is not legally liable," was dictum; for the opinion had asserted, that "The record contains no evidence tending to prove a ratifica-

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tion by the defendants of the contract of renting." Still, there are authorities, English and American, which sustain that dictum.

There are two lines of decisions bearing on the inquiry of what acts of ratification of an infant's contract, done after reaching majority, will preclude him from interposing the defense of infancy. Following the older dicta on the subject, one of these lines "holds that an infant's contract imposes no legal liability on him until ratified after full age has been attained, and such ratification must have all the elements of a new contract except a new consideration. There must be an express promise, or such acts after the infant becomes of age, as practically lead to the conclusion that he intended to ratify the contract and pay the debt. Such a debt is regarded as standing on the same footing as a debt that has been destroyed by a discharge in bankruptcy, and not as one that is barred by the statute of limitations."—10 Amer. & Eng. Encyc. of Law, 644-5; *Edmunds v. Mister*, 58 Miss. 765; *Tibbets v. Gerrish*, 25 N. H. 41; *Wilcox v. Roath*, 12 Conn. 550. See also, Tyler on Infancy, pp. 84-87, and authorities; Bishop on Contracts, § 943; *Thrupp v. Fielder*, 2 Esp. 628; *Thompson v. Lay*, 4 Pick. 48; *Benham v. Bishop*, 9 Conn. 330; *Goodsell v. Myers*, 3 Wend. 479; *Hinely v. Margaritz*, 3 Penn. St. 428; *Ford v. Phillips*, 1 Pick. 202; *Hale v. Gerrish*, 8 N. H. 374; *Thing v. Libbey*, 16 Me. 55; *Turner v. Gaither*, 83 N. C. 357, 35 Amer. Rep. 574. So, there is a strong array of authorities in favor of this severer and more exacting rule.

"The other line of cases lays down the rule that the contracts of infants are only suspended during minority, and may be ratified on full age upon the same principles and for the same reasons as a debt barred by the statute of limitations may be revived. Therefore, a new promise, positive and precise, equivalent to a new contract, is not essential, but as the words 'ratify' and 'confirm' necessarily import that there is something in existence to which ratification or confirmation can attach, any words or acts by the infant, after arriving at full age, that clearly recognize the existence of the contract as a binding obligation, will constitute a ratification."—10 Amer. & Eng. Encyc. of Law, 645-6. This latter statement of the rule is supported by a respectable array of authorities, and the author expresses his approval of it in the

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following language: "This latter rule seems more consonant with principle and with the tendency of the modern cases, holding that the infant is insufficiently protected by a right to avoid his contracts, which are valid until avoided."—*Henry v. Root*, 33 N. Y. 526. Speaking of the alleged principle that to constitute a binding ratification, it is essential that the promise or act should be given or done with knowledge that he is not legally liable on the contract, this author, on p. 648, says: "It is not necessary to the validity of the ratification that the person lately an infant should be aware of his right to avoid his contract; ignorance of the law gives him no excuse." To this he cites several authorities, and among them Wharton on Contr., § 57, who speaks in strong condemnation of the alleged doctrine. To the same effect see 7 Wait Act. & Def. 138; *Morse v. Wheeler*, 4 Allen 570. A very instructive discussion of this question will be found in Ewell's Leading Cases, note to *Hale v. Gerrish*, commencing on p. 173.

In Alabama we have not adopted the exacting rule, but have held that all contracts of infants, with a very limited exception, are simply voidable—not void.—*Jefford v. Ringgold*, 6 Ala. 544; *Thomasson v. Boyd*, 13 Ala. 419; *West v. Penny*, 16 Ala. 186; *Shropshire v. Burns*, 46 Ala. 108; *Philpot v. Bingham*, 45 Ala. 435; *Flerner v. Dickerson*, 72 Ala. 318; *Sharpe v. Robertson*, 76 Ala. 343. We think we better carry into effect the policy declared in our decisions, and better subserve the purposes of justice by holding, as we do, that contracts of infants, such as we have in hand, are simply voidable, not void, by reason of the infancy; that it is a defense he may or may not make, at his option; that an express promise to pay is not the only method by which the defense may be precluded, but any other declaration or act which satisfies the trying body that the liability or contract duty is still binding and intended to be complied with, if voluntarily done, or entered into, completely neutralizes the defense of infancy; and that it is not necessary to a binding ratification that the party sought to be charged knew, at the time the promise was made, or act done, that he or she had the right to avoid the contract. All men are presumed to know the law, and no one will be heard to plead ignorance of it.

According to Mrs. Wright's testimony, her first husband, Vol. 101.

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band, Griffin, died on June 13, 1885, only 3 or 4 days before she reached her majority. He died in Florida. She testified further "that the expense of the trip to Florida, together with the removal of his remains to this (Etowah) county, and the interment of them here, consumed the \$500 borrowed from plaintiff." Now it would be very extraordinary if she paid all these funeral expenses, or any part of them, within the few days before she became 21 years old. If she did not, then she utilized and converted a part of plaintiff's money after she attained her majority. The record is silent as to when she paid out the money. She does, however, testify that she paid all interest coupons, save the last, when they matured. They matured severally, four of them, on December 1, 1885, 1886, 1887, 1888; and the last, or unpaid one, on March 12, 1890. Each represented the amount of accrued interest on the \$500 borrowed, up to the times they severally matured. If she did not owe the \$500, she did not owe the interest coupons, for they had no other consideration than the forbearance of that debt. Each payment was an acknowledgment that the contract was binding. Defendant had ratified the voidable contract, and the judgment ought to have been in favor of the plaintiff. We have not the means of rendering a proper judgment here.

Reversed and remanded.

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Action on a Promissory Note.

1. *Abstract charge.*—The giving of a charge that is merely abstract does not, as a general rule, work a reversal of the judgment; but where it is manifest to the appellate court that the giving of such abstract charge misled the jury to the prejudice of the party cast in the suit, the judgment consequent thereupon will be reversed.

2. *Instructions not based on evidence.*—When, in an action on a promissory note given for the purchase price of a bale of Havana tobacco, which was bought at the same time with a case of leaf tobacco, a separate note being given for the latter, the defendant's evidence showed that the leaf tobacco, represented to be "natural sweat leaf," was in fact re-sweated, and not worth more than twenty cents

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instead of thirty cents per pound, the price given, and that he agreed, however, to accept it, if plaintiffs would extend the time of his note for such leaf tobacco, which was done, but there was no evidence that the defendant asked for an extension of time of the payment of the note for the Havana tobacco, which was the note sued on, and had made no claim that said Havana tobacco was not as represented, it is a reversible error to instruct the jury that, "Even though the jury may believe the defendant asked for and obtained an extension of time of the indebtedness sued on, this does not prevent him setting up a failure of consideration in the debt sued on, if the defendant was not aware, at the time of the giving of the note, that the tobacco was re-sweated, and it was in fact re-sweated;" such charge being not only abstract, but also misleading.

APPEAL from the City Court of Birmingham.

Tried before the Hon. H. A. SHARPE.

This was an action of assumpsit, brought by the appellants against the appellee on a promissory note. The defendant pleaded the general issue, want of consideration and failure of consideration. Upon the trial of the cause, as is shown by the bill of exceptions, the plaintiff introduced the note sued on, which was in words and figures as follows:

"\$129.80. BIRMINGHAM, Ala. June 1st, 1890.

Four months after date I promise to pay to the order of Goldsmith & Davis, one hundred twenty-nine and 80-100 dollars, value received at Birmingham, Ala. [signed] H. J. McCafferty." They also introduced a statement of the bill of the defendant with the plaintiffs, in words and figures as follows: "H. Judson McCafferty, Birmingham, Ala. bought of Goldsmith & Davis, terms four months note, 1 bale Havana tobacco, 118 lbs, at \$1.10, \$129.80, one case leaf tobacco, \$105.00, 350 lbs., 30 cents, \$105.00." Here the plaintiff rested. The bill of exceptions then recites: "The defendant McCafferty was then introduced, who testified that the tobacco was unsound and that the same had been re-sweated, and that it was not worth exceeding 20 cents per pound, that plaintiffs had guaranteed the soundness of said tobacco at the time the sale was made. The defendant further testified that at the time he bought the tobacco it was represented to be natural sweat leaf, but in fact defendant found for the first time, after keeping it about six weeks, that the tobacco was re-sweated, and he then wrote to the plaintiffs, and they sent the written guarantee that

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it was not re-sweated. The longer defendant kept the tobacco, the worse it got. Goldsmith, one of the plaintiffs, called to see defendant in July or August, 1891, and assured him that the tobacco was not re-sweated. On re-examination, defendant testified that he did not know that the tobacco was re-sweated until after the notes were given. On cross examination, defendant testified that he received from plaintiffs letters dated May 12, May 13th, June 7th, August 4th, and September 13th, 1890, and he wrote letters July 21st, July 29th, October 13th. And he further testified that he had used all of the tobacco purchased from plaintiffs in his business. He also introduced one Pfeister, who testified that he was in the cigar manufacturing business, well acquainted with the quality of tobacco, and that said tobacco he had examined at the request of defendant, and that the same was unsound, had been re-sweated, and that the same was not worth exceeding 20 cents per pound. The defendant introduced another witness who testified to the same effect." The plaintiffs then introduced in rebuttal the letters, which had passed between them and the defendant, and which were as follows:

"New York, May 12th, 1890. Mr. H. Judson McCafferty, Birmingham, Ala. Dear Sir: Your order through our Mr. Goldsmith to hand. Tobacco will be shipped tomorrow. Yours truly, Goldsmith & Davis."

"New York, May 13th, 1890. Mr. H. Judson McCafferty, Birmingham, Ala. Dear Sir: We have this day shipped the leaf via Savannah Str. Enclosed you will please find bill. Trusting to receive your future orders, we are, Yours truly, Goldsmith & Davis."

"New York, June 7, 1890. Mr. H. J. McCafferty, Dear Sir: Your letter we have received, and in reply wish to say that we are surprised that the case of wrappers our Mr. Goldsmith sold you is not satisfactory. Mr. Goldsmith sold quite a number of them, and we had no complaint; but we wish to state to you that if the case is not satisfactory you can return the same, we don't want you to keep any stock if not satisfactory, but if you would try the same a little more we have no doubt it would turn out satisfactory. Hoping to receive your future orders, we remain, Yours truly, Goldsmith & Davis."

"Birmingham, Ala. July 21st, 1890. Goldsmith &

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Davis, New York, Gentleman: Sirs, I was unable to get to case leaf in question to give it a fair trial on mold until last week as I was short on a cigar that I make by hand. The leaf works quite well on mold; but I make but few mold cigars, and the case would last me a long time for that kind of work. Although, I will keep it if you will give me longer time on it. Let me hear from you, and oblige, Yours truly,

H. J. McCafferty."

"Birmingham, Ala. July 29th, 1890. Goldsmith & Davis, New York, Gentlemen: Sirs, Inclosed you will find notes for the amount of bill bought of your Mr. Goldsmith. I have dated note for Havana from June first, as that was the arrangements I made with Mr. G. Hoping this will be satisfactory, Respectfully,

H. J. McCafferty."

"New York, Aug. 4th, 1890. H. J. McCafferty, Dear Sir: Your letter with enclosed two notes for \$234.80 received, and have given you credit for the same and enclosed please [find] receipt and accept thanks, Yours truly,

Goldsmith & Davis."

"New York, Sept. 13th, 1890. Mr. H. J. McCafferty, Birmingham, Ala. Dear Sir: In reference to the leaf we shipped to you on May 12, 1890, will say that our Mr. Goldsmith has arrived home, and will say he finds the tobacco sound and is not re-sweated; and we can, therefore, not exchange the same, as you have the tobacco in your possession now over four months. Our notes must be paid when due. Yours truly,

Goldsmith & Davis."

"Birmingham, Ala. Oct. 2nd, 1890. Goldsmith & Davis, New York City. Gentlemen: Your Mr. Goldsmith gave me his word of honor that his firm would deal fair with me, and I am somewhat surprised that my note has been protested. I am willing to pay what the leaf is worth; and have been advised that you can not collect any more than that, after your written guarantee that it was not re-sweated and would not spoil. I have handled tobacco for twenty odd years, and know something about leaf, and I say this goods is re-sweated, and not worth the price asked. If you think best to sue, go ahead. I will stand you a trial. Respectfully,

H. J. McCafferty."

"Birmingham, Ala. Oct. 13th, Goldsmith & Davis, New York, Gentlemen: Yours of the 6 at hand and in

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reply will say your sale of tobacco to me was *re-sweated goods* and a swindle from the start, for I am told by another manufacturer that your Mr. Goldsmith offered the Havana to him for 5c less per lb. than he sold it to me. Another man, old in the cigar business, says the case of leaf is not worth more than 18c lb. at the *most*. It is only fit for binders; and will enclose a copy of your guarantee that the goods [would] not spoil. Also in your letter of June 7th, are these words: 'If the case is not satisfactory, you can return the same; but if you would try the same we have no doubt it would turn out satisfactory.' With all of this kind of fair writing on your part, I felt safe in sending you my notes. The Havana has lost its aroma, and is but very little better than any good domestic filler. However, I will repeat I am willing to pay all the tobacco is worth and *no more*; the price to be decided by reliable cigar men. This is final, and I await your further action. Respectfully,

H. J. McCafferty."

The plaintiffs requested the court to give the following written charge to the jury, and duly excepted to the court's refusal to give the same as asked: "If the jury believe from the evidence that the plaintiffs did by letter, on the 7th day of June, 1890, offer to rescind the contract and take back the tobacco, and that subsequently to that time the defendant agreed to pay the said note upon an extension of time for the payment of the debt, and that said extension of time was granted by plaintiff, then defendant ratified the contract, and they should find for the plaintiffs."

The charge which was given by the court at the request of the defendant, to the giving of which the plaintiffs duly excepted, is copied in the opinion.

There was judgment for the sum of \$20.75, from which judgment the plaintiffs now appeal, and assign as error the court's refusal to give the charge requested by them, and the court's giving the charge requested by the defendant.

BUSH & BROWN, for appellants.

CABANISS & WEAKLEY, *contra*.

McCLELLAN, J.—On May 12, 1890, Goldsmith &

Davis sold to McCafferty "1 bale Havana tobacco, 118 lbs. at \$1.10—\$129.80, and one case leaf tobacco, 350 lbs, 30 cents, \$105," on four months time. On August 4th, 1890, the evidence tends to show, McCafferty delivered separate notes for the two items of the account, that for \$129.80 being the price of the bale of Havana bearing date as of June 1st, and that for \$105, being the price of the case of leaf tobacco, bearing date as of July 1st. Each note was payable four months after date. Before these notes were executed a controversy arose between the parties as to the condition and quality of the *case of leaf tobacco*. McCafferty claimed that this tobacco was unsound, and, finally—he now says after the notes had been delivered—that it had been re-sweated, whereas it had been represented and sold to him as "natural sweet leaf," and that it was not worth more than twenty cents per pound. He brought forward and insisted upon these claims by letters to the sellers; but on July 21st, before the notes were delivered, he wrote that he would keep it, if Goldsmith & Davis would give him a longer time than four months in which to pay for it. There is evidence, in the fact that the note for this item was made payable four months from July 1st, instead of from May 13th, the date of the bill, or June 1st, the date of the other note, tending to show that this proposition was accepted and the extension granted. On the other hand, in respect of the bale of Havana tobacco, the other item in the account, the amount of which was \$129.80, for which a separate note was given, there is no evidence that any controversy ever arose between the parties. All that is said in the correspondence, or any where in the evidence, having reference to this item is found in McCafferty's letter of October 13th. He there says: "The Havana has lost its aroma, and is but very little better than any good domestic filler." This letter was written five months after the sale and delivery, and it can not be construed into a claim that the tobacco was not as represented at the time of the sale; but only that during the intervening time it has lost its aroma; and this fact appears to have been thrown out merely for the purpose of conducing to a more favorable consideration of the buyer's claims as to the leaf tobacco. No extension of time for payment of this item is asked, and that none was granted is apparent from the date of the note, which is as of the

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first day of the month succeeding that toward the end of which the goods were received, and even the failure to date the note on the precise day of the receipt of the goods is explained in McCafferty's letter of July 29th, where he says: "I have dated note for Havana from June 1st, as that was the arrangement made with Mr. G.," and this arrangement with Mr. G. was clearly a matter of convenience of dates and not of any real extension of time, since it is not reasonable to suppose that McCafferty having, as he claimed, a serious grievance against the sellers which he proposed to abandon for an extension of time of payment would have been content with the very few days intervening between the arrival of the shipment and the first of June. On the foregoing and other considerations shown by the bill of exceptions (which the reporter will set out in full) is based our conclusion that in point of fact no question has ever been made as to McCafferty's liability for the full amount of the note for \$129.80, representing the price of the Havana tobacco, and no claim was ever made that that tobacco, the sale and purchase of which was segregated from that of the leaf tobacco, and constituted a separate transaction in legal effect by McCafferty himself, was unsound, or was re-sweated or was worth only twenty cents per pound, and no extension of time for payment therefor was ever asked or granted.

The present action is upon this note for \$129.80, evidencing McCafferty's indebtedness for the *bale of Havana tobacco*, the price of which as we have seen, was \$1.10 per pound. The note for \$105, for the case of *leaf tobacco* at 30 cents per pound, is no more involved here than if the transaction out of which it arose had never transpired. The trial court, however, instructed the jury, at defendant's request, as follows: "Even though the jury may believe the defendant asked for and obtained an extension of time of the indebtedness sued on, this does not prevent him setting up a failure of consideration in the debt sued on, if the defendant was not aware, at the time he gave the note, that the tobacco was re-sweated, and it was in fact re-sweated." And the jury returned a verdict for the plaintiffs for the value of the Havana tobacco, which they found to be twenty cents instead of one dollar and ten cents per pound. It is clear that this charge was entirely abstract, in that there was no evi-

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dence that any extension of time was asked or granted in respect of the Havana tobacco, or that it was resweated, and this tobacco alone constituting the consideration of the note sued on, there was, it follows, no evidence of a failure of consideration. It is clear also to us that the jury were misled by this instruction to the conclusion that the evidence as to resweating, extension of time and failure of consideration had reference to the Havana tobacco and the note sued on, when in truth its relation was entirely to the case of leaf tobacco and the note for \$105, which is not sued on, since their verdict is wholly inexplicable upon any other hypothesis.

It is very rarely the case that the giving of an abstract charge requires the reversal of a judgment. But where the charge is abstract and misleading, and it is, as here, manifest that the jury has been misled by it to the prejudice of the appellant, the law is well settled, that the consequent judgment should be reversed.—*Bernstein v. Humes*, 71 Ala. 260; *Herring v. Skaggs*, 73 Ala. 446; *Beck v. State*, 80 Ala. 1; *State v. Vance*, 80 Ala. 356; *Goldsmith v. State*, 86 Ala. 55; 5 So. Rep. 480; *Schaungut's Admr. v. Udell & Crunden*, 93 Ala. 302, 9 So. Rep. 550.

For this error, into which the lower court was probably led by a request for an instruction on the same subject and likewise abstract by the plaintiffs, the judgment must be reversed. The cause is remanded.

Reversed and remanded.

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Bill in Equity to have a Mortgage declared a General Assignment.

1. *Mortgage to secure pre-existing debt a general assignment.*—Where an insolvent debtor mortgages all of his property to secure a pre-existing debt, and this mortgage is satisfied prior to its maturity by the sale of part of the goods and the procurement of money by the mortgagor from another person by a second mortgage conveying the same property, the first mortgage is declared to be a general assignment for the benefit of the debtor's creditors, (Code, § 1737), and the

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money received by the first mortgagee, in satisfaction of his mortgage, is a trust fund in his hands, subject to the claims of the mortgagee's creditors.

2. *Bill to have mortgage declared a general assignment; second mortgagee not a necessary party.*—Where a bill is filed to have a mortgage executed by an insolvent debtor to secure a pre-existing debt declared a general assignment, the second mortgagee, from whom the debtor obtained money to satisfy the mortgage executed to the first mortgagee, is not a necessary party.

APPEAL from the City Court of Anniston.

Tried before the Hon. B. F. CASSADY.

R. D. Ward & Co., and other creditors of the Anniston Carriage Works, on the 28th day of January, 1892, filed their bill in the city court of Anniston, seeking to have a mortgage executed by the Anniston Carriage Works to the Anniston Loan & Trust Co. declared a general assignment, for the benefit of all creditors of said Anniston Carriage Works. It is alleged that on the 2d day of November, 1891, the Anniston Carriage Works executed a mortgage conveying to the Anniston Loan & Trust Co. substantially all of its property, to secure a pre-existing debt. The mortgage was due sixty days after date, and matured on the 1st day of January, 1892. The prayer of the bill is that the mortgage be declared a general assignment for the benefit of all the creditors, and that the Anniston Loan & Trust Co. be held to account to the creditors for the value of the stock of buggies, carriages and merchandise, alleged to be of the value of eleven thousand dollars, for the benefit of the general creditors.

The respondents, the Anniston Carriage Works and the Anniston Loan & Trust Co., answered the bill, and alleged that the Anniston Carriage Works was indebted to the Anniston Loan & Trust Co. in the sum of about five thousand dollars, for advances made by said Anniston Loan & Trust Co., which was doing a banking business, in paying drafts drawn by said Anniston Carriage Works, and overdrafts made by the latter, the aggregate of which amounted to over five thousand dollars, and for which it negotiated a loan with said bank, due sixty days after date, and executed a mortgage to secure the same upon its stock of buggies, carriages and other merchandise, consisting substantially of all its property. Prior to the maturity of this debt, and on the 3d day of

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December, 1891, the Anniston Carriage Works paid the debt in full, and the mortgage was satisfied, and the Anniston Loan & Trust Company, which had temporarily assumed possession of the mortgaged property, restored the same to the mortgagor, and the mortgage was cancelled and satisfied. Afterwards, and before the filing of the bill in this cause, the Anniston Carriage Works executed a new mortgage upon the same property to one William Noble to secure a loan which it obtained from said William Noble, contemporaneously with the making of said mortgage, and subsequently made a bill of sale to William Noble in extinguishment of this mortgage. Both respondents pleaded that William Noble is a proper and necessary party respondent to the bill; and the Anniston Carriage Works filed a separate plea setting up the invalidity of the mortgage, because it had not been authorized by a stockholder's meeting, nor had thirty days notice of any meeting for that purpose been given to the stockholders, or any of them. Each of the respondents filed demurrers for the non-joinder of other creditors of the Anniston Carriage Works as co-complainants.

On the final submission of the cause, the court below overruled the demurrer and plea, and rendered a decree granting the relief prayed for by complainants. Respondents appeal, and assign this decree as error.

KNOX, BOWIE & PELHAM and J. J. WILLETT, for appellants.—When the indebtedness of the Anniston Carriage Works to the Anniston Loan & Trust Company was paid, the claim on the Loan & Trust Company was extinguished; and by accepting its payment the latter company violated no obligation which it owed to other creditors of the Anniston Carriage Works, nor did it incur any liability to them. It could not refuse to accept payment of the mortgage indebtedness. It held only a conditional conveyance of the property, by the very terms of which it was stipulated that the mortgage should be void if paid at maturity. It would be contrary to all rules of equity to hold the bank liable as a trustee *in invitum* for doing what the mortgage contract bound it to do and what the Carriage Works could compel it to do.—*Benedict, Hall & Co. v. Renfro Bros.*, 75 Ala. 121; *Murray v. McNeely*, 86 Ala. 234; 5 So. Rep. 565; *Rankin v. Vandiver*, 78 Ala. 562; *Stephens v. Regenstein*, 89 Ala. 561; 8

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So. Rep. 68; *Harmon v. McRae*, 91 Ala. 401, 8 So. Rep. 548. The case of *Danner & Co. v. Brewer & Co.*, 69 Ala. 191, does not apply. In that case the mortgagee afterwards received a deed to the property and appropriated it to his own use. Even a trustee *in invitum* is only liable for the amount actually received.—*Hill v. Jones*, 65 Ala. 214. The bill in this case should have been dismissed for want of necessary parties.—3 Brick. Dig. 33*; *Merritt v. Phenix*, 48 Ala. 87; *Prout v. Hoge*, 57 Ala. 28; *Thornton v. Neal*, 49 Ala. 590; 3 Brick. Dig., 373, §§ 97, 98.

CASSADY, BLACKWELL & KEITH, *contra*, cited *Danner v. Brewer*, 69 Ala 191; *Andrews v. Hobson*, 23 Ala 219; *Ross v. Barclay*, 55 Amer. Dec. 616, and authorities there cited; *Shepherd v. McEvers*, 8 Amer. Dec. 561.

COLEMAN, J.—On or about the 2d day of November, 1891, the Anniston Carriage Works, a body corporate, being then indebted to complainants, the appellees, and other creditors, to secure a past indebtedness due and owing to the Anniston Loan & Trust Co., also a body corporate, executed to it a mortgage upon substantially all its property and effects. Complainants, creditors of the Anniston Carriage Works, filed the present bill, seeking to have the mortgage conveyance to the Loan & Trust Co. declared a general assignment for the benefit of all its creditors. The mortgage to the Anniston Loan & Trust Co. was executed in the name of "Anniston Carriage Works, by Randolph St. John, Secretary and Treasurer." The evidence is sufficiently satisfactory that this mortgage was executed by authority granted by the board of directors. It was certainly subsequently recognized and ratified as binding. The main defense relied upon is, that the mortgage debt was satisfied and the mortgage cancelled on or about the 1st of December, 1891, long before the filing of the present creditors' bill. The facts upon which this defense is based, briefly stated, are as follows: The mortgage to the Anniston Loan & Trust Co. was executed on the 2d of November, 1891, to secure a debt of \$5,000, and it became due on the 2d day of January, 1892. The Loan & Trust Co. took immediate possession of the property. On the 1st of December, prior to the maturity of the mortgage, the Anniston

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Carriage Works borrowed from William Noble four thousand dollars, and to secure the payment of this indebtedness the Anniston Carriage Works executed another mortgage to William Noble on the identical property, which had been mortgaged to the Loan & Trust Co., except such portion as had been previously sold. The check of William Noble for four thousand dollars, together with the check of the carriage company for one thousand dollars, was applied to the Loan & Trust Co. in payment and satisfaction of the debt due it from the carriage company, and the mortgage of the carriage company to secure this debt was cancelled.

Section 1737 of the Code reads as follows: "Every general assignment made by a debtor, by which a preference or priority of payment is given to one or more creditors, over the remaining creditors of the grantor, shall be and enure to the benefit of all the creditors of the grantor equally; but this section shall not apply to or embrace mortgages given to secure a debt contracted contemporaneously with the execution of the mortgage, and for the security of which the mortgage was given." It is averred in the bill, and the proof shows, that the debt due the Loan & Trust Co., to secure which the mortgage to that company was executed, was not contracted contemporaneously, but was a past due debt. The proof also shows that the mortgage embraced substantially all the grantor's property, and that the grantor, the carriage company, at the time was insolvent. It is clear that this mortgage was a general assignment within the meaning of the statute, and if complainants had filed their bill before the execution of the mortgage to William Noble, and before the attempted cancellation of the mortgage to the Loan & Trust Co., asking for its foreclosure for the benefit of creditors, we would be compelled to declare that the conveyance created a general assignment, and that it could be enforced for the benefit of the non-preferred creditors. These complainants and other creditors not named in the mortgage had the same rights and were entitled to the same privileges in the conveyed property, by virtue of the statute, as if they had been named and specifically provided for along with the Anniston Loan & Trust Co., so far as the Anniston Loan & Trust Co. is concerned. Possibly the effect upon third parties, not charged with notice, would be differ-

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ent. Neither would this result be altered, if, under the power contained in the mortgage, the Anniston Loan & Trust Co. had foreclosed the mortgage and applied the proceeds to the payment of the debt secured by the mortgage. A court of equity, at the instance of non-preferred creditors, would decree the conveyance a general assignment, and the mortgagee an assignee or trustee of the proceeds of the mortgage property for their benefit.—*Danner & Co. v. Brewer*, 69 Ala. 191; *Holt v. Bancroft*, 30 Ala. 193.

Can it make any difference in principle because the grantor, by a second mortgage on the same property, borrows money from a third person and pays it over to the preferred creditor in satisfaction of a conveyance, which the law declares "shall enure to the benefit of all the creditors of the grantor equally?" The transaction shows that it was the understanding of all the parties that the money loaned by William Noble was to be paid over to the Anniston Loan & Trust Co., and that company was to cancel its mortgage, so that the carriage company could, by a second mortgage, secure William Noble in the loan of four thousand dollars. Suppose in the first instance, William Noble had purchased the entire property for a cash consideration of four thousand dollars, which is proven to have been worth then full five thousand dollars, it could not be said he had paid a fair equivalent for the property. It is apparent that when the property was mortgaged to the Loan & Trust Co. it was worth five thousand dollars, the full equivalent of the debt secured by the conveyance. In the meantime, before the execution of the mortgage to William Noble, one thousand dollars of this property had been disposed of. It was in the possession of the Loan & Trust Co. It could not have been disposed of without its consent. We infer the check of the carriage company for one thousand dollars covered the value of the property which had been thus disposed of before the execution of the mortgage to William Noble. Thus, under and by virtue of the mortgage, which we declare to have created a general assignment for the benefit of all the creditors, the Loan & Trust Co. has realized the entire proceeds of the property conveyed. Equity looks at the substance and effect of a transaction. It will not permit the rights of creditors, secured to them by the law,

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to be circumvented or overreached. We hold that the bill is properly filed against the Anniston Loan & Trust Co., and that the proof sustains the averment that the mortgage was a general assignment, enuring to the benefit of all the creditors. William Noble has no interest in what disposition is made of the money paid by him for the property. The mortgage to him was to secure a debt contracted contemporaneously with the execution of the mortgage, and it may be was not within the influence of section 1737 of the Code; but this section can not alter the effect of the mortgage to the Loan & Trust Co. It was this latter mortgage that enabled the Loan & Trust Co. to monopolize the entire assets of the carriage company. The money stands in lieu of the property, and is equally subject to the claim of other creditors. It is the proceeds of the property in the hands of the Anniston Loan & Trust Co., which is sought to be reached and subjected by the bill.

Notice should be given to all the creditors who are entitled to share in the proceeds to come in and prove their claims. This we understand to be the effect of the decree of the city court, and in so holding there was no error.

Affirmed.

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Action against a Railroad Company for killing Cattle.

1. *Action against a railroad company for killing cattle; negligence; when determined by the jury.*—Where, in an action against a railroad company for killing cattle, it is shown that the cattle were killed by defendant's train, and the testimony for the plaintiff tends to show that at the place of the killing the track was straight and the view unobstructed for a mile, while the testimony for the defendant was to the effect that the cattle were grazing a short distance from the track, and, when the train was a quarter of a mile from them, they showed no restlessness or disposition to move towards the track, and that when the train was close upon them they started upon the track whereupon the engineer,

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who had kept a steady look out, used all the means within his power to stop the train, it is for the jury to determine whether the cattle killed came on the track so suddenly and near to the engine that the persons operating the train could not, by the exercise of reasonable care and diligence, prevent the injury; and the defendant is not, therefore, entitled to the general affirmative charge.

2. *Same; charge to the jury.*—In such a case a charge that the jury must find for defendant, if they believed the defendant's evidence is properly refused, since it confines the jury to the consideration of only a part of the testimony, when they should, in making up their verdict, consider all the evidence together.

3. *Same.*—The court properly charged the jury that, "To prove that the engineer was on the lookout at the time when he actually discovered the cattle, is not enough to show that he fully performed his duty. If he failed to discover the cattle sooner, when he might have done so, if he had kept a proper lookout prior to the actual discovery of the cattle, then the defendant is chargeable with negligence."

4. *Same.*—A charge is properly refused, which instructs the jury that if the engineer saw the cattle a quarter of a mile before reaching them, when they were standing near, and indicating no intention of moving to the track, and would not probably have been injured where they were, he was under no further duty to look out for their safety.

5. *Same.*—A charge that requires the plaintiff to prove negligence on the part of the defendant, committed prior to the time the cattle got upon the track, is properly refused, since, if the injury resulted from the negligence of defendant's employes, committed subsequently to the time the cattle got upon the track, the defendant is liable, although there may have been no negligence prior to that time.

APPEAL from the City Court of Birmingham.

Tried before the Hon. W. W. WILKERSON.

This was an action brought by the appellee, S. S. Rice, against the Louisville & Nashville Railroad Co., to recover damages for the alleged negligent killing of three cows, the property of the plaintiff. The complaint contained two counts, and issue was joined on the plea of the general issue.

On the trial of the cause the testimony for the plaintiff tended to show that the cows killed by the defendant were his property; that at the place where the cows were killed the track was straight for about a mile, and there was nothing to obstruct the view for that distance; that he saw the cows about three hours before they were killed, and that after they were killed he found them lying near the defendant's track. It was admitted that the train of the defendant killed the cows.

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The evidence in behalf of the defendant was the testimony of the engineer and fireman, who were operating the engine at the time the cows were killed. The testimony of the engineer in reference to the accident, as shown by the bill of exceptions, was as follows: "He saw at the right of the track a drove of about fifteen cows standing grazing off of the right of way some little distance; that he was then a quarter of a mile from them; that as he approached the cows gave no signs of uneasiness, and did not move towards the track or show any signs of so doing, until he got within a short distance of where they were standing; that during this time he kept a steady lookout ahead; that when he was within a short distance of the cows, two or three of them started up and ran towards the track, whereupon he called for brakes, sounded his cattle alarm, and reversed his engine, and shut off steam, and put on his jam; that these were all the means he had at hand to stop his train; that his appliances for checking the speed of the train were in good condition, and were the same as are used on all well regulated railroads." The testimony of the fireman was to the same effect.

The court, at the request of the plaintiff, gave the following written charge: "To prove that the engineer was on the lookout at the time when he actually discovered the cattle, is not enough to show that he fully performed his duty. If he failed to discover the cattle sooner, when he might have done so, if he had kept a proper lookout prior to the actual discovery of the cattle, then the defendant is chargeable with negligence." The defendant duly excepted to the giving of this charge, and also separately excepted to the court's refusal to give each of the following written charges requested by it: (1.) "If the jury believe the evidence of defendant, they must find for defendant." (2.) "The burden of proving negligence on the part of the defendant in the management of its train, prior to the time when the jury believe plaintiff's cattle got on defendant's track, is on the plaintiff." (3.) "The burden of showing that the defendant's engineer was guilty of negligence, in keeping a lookout for plaintiff's stock before they got on defendant's track, is on the plaintiff." (4.) "If the jury believe the evidence they must find for the defendant under the first count." (5.) "If the jury believe the

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evidence they must find for the defendant under the second count." (6.) "If the jury believe from the evidence that, at the time the train reached a point one-quarter of a mile from where the cattle were when killed, the engineer saw the stock first, and that at that time the stock were standing not on the track but near the track, and did not indicate any intention of moving to the track, and would not probably have been injured where they were, the defendant's engineer was not guilty of negligence in the matter of keeping a lookout, with which the defendant is chargeable in this action."

There was judgment for plaintiff. Defendant appeals, and assigns as error the giving of the charge asked by plaintiff, and refusing to give the several charges requested by it.

HEWITT, WALKER & PORTER, for appellants, cited *Kansas City, Memphis & Charleston R. R. Co. v. Watson*, 91 Ala. 483, 8 So. Rep. 793; *Ala. Gt. So. R. R. Co. v. Moody*, 92 Ala. 279, 9 So. Rep. 238; *Ga. Pac. Railway Co. v. Hughes*, 87 Ala. 610, 6 So. Rep. 413; *M. & E. Railway Co. v. Perryman*, 91 Ala. 413, 8 So. Rep. 699; *Western Railway Co. v. Lazarus*, 88 Ala. 453, 7 So. Rep. 877.

ARNOLD & EVANS, *contra*. The charges given for the plaintiff states a correct rule of law.—*E. T. V. & G. R. R. Co. v. Baker*, 94 Ala. 632, 10 So. Rep. 211; *K. C. M. & B. R. R. Co. v. Watson*, 91 Ala. 483, 8 So. Rep. 793; *A. G. S. R. R. Co. v. Powers*, 73 Ala. 244.

The first charge asked by the defendant was faulty in many respects. The testimony of the defendant did not relieve it from negligence. An effort to stop the train, after the cattle actually started towards the track, did not fill the measure of the engineer's duty where the cattle were seen, or ought to have been seen, in dangerous proximity to the track.—*E. T. V. & G. R. R. Co. v. Watson*, 90 Ala. 41, 7 So. Rep. 813; *K. C. M. & B. R. R. Co. v. Watson*, 91 Ala. 483, 8 So. Rep. 793; *Western Railway Co. v. Sistrunk*, 85 Ala. 352, 5 So. Rep. 79; *Western Railway Co. v. Lazarus*, 88 Ala. 453, 7 So. Rep. 877; *L. & N. R. R. Co. v. Posey*, 96 Ala. 262, 11 So. Rep. 423; *M. & B. R. R. Co. v. Kimbrough*, 96 Ala. 127, 11 So. Rep. 307. Said charge presented the defendant's aspect of the case on only a part of the evidence, and was for that

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reason properly refused.—*Snider v. Burke*, 84 Ala. 53, 4 So. Rep. 225; *Hussey v. State*, 86 Ala. 34, 5 So. Rep. 484; *Mobile Savings Bank v. McDonnell*, 89 Ala. 434, 8 So. Rep. 137; *Nelson v. Warren*, 93 Ala. 408, 8 So. Rep. 413; *A. G. S. R. R. Co. v. Hill*, 93 Ala. 514, 9 So. Rep. 722; *Steed v. Knowles*, 97 Ala. 573, 12 So. Rep. 75; 3 Brick. Dig., 111, § 83.

The second and third charges asked by the defendant misplaced the burden of proof, and were properly refused.—*M. & G. R. R. Co. v. Caldwell*, 83 Ala. 196, 3 So. Rep. 445; *Nashville & C. R. R. Co. v. Hembree*, 85 Ala. 481, 5 So. Rep. 173; *S. & W. R. R. Co. v. Jarvis*, 95 Ala. 149, 10 So. Rep. 323; *L. & N. R. R. Co. v. Posey*, 96 Ala. 262, 11 So. Rep. 423; *L. & N. R. R. Co. v. Barker*, 95 Ala. 435, 11 So. Rep. 453. The fourth and fifth charges asked by the defendant, being the general affirmative charges, were properly refused. There was evidence from which the jury might have reasonably inferred negligence on the part of the defendant, and the general affirmative charge can not be given in such instances.—*E. T. V. & G. R. R. Co. v. Watson*, 90 Ala. 41, 7 So. Rep. 813; *K. C. M. & B. R. R. Co. v. Watson*, 91 Ala. 483, 8 So. Rep. 793; *E. T. V. & G. R. R. Co. v. Baker*, 94 Ala. 632, 10 So. Rep. 211; *S. & W. R. R. Co. v. Jarvis*, 95 Ala. 149, 10 So. Rep. 323; *M. & B. R. R. Co. v. Kimbrough*, 96 Ala. 262, 11 So. Rep. 307; *Payne v. Mathis*, 92 Ala. 585, 9 So. Rep. 605; *Sublett v. Hodges*, 88 Ala. 491, 7 So. Rep. 296; *Tabler v. Sheffield L. & I. Co.*, 87 Ala. 305, 6 So. Rep. 196; *E. T. V. & G. R. R. Co. v. Baker*, 94 Ala. 632, 10 So. Rep. 211; *E. T. V. & G. R. R. Co. v. Turville*, 97 Ala. 122, 12 So. Rep. 63; 3 Brick. Dig. 110, §§ 52, 55.

It was not error to refuse to give the sixth charge asked by the defendant. Whether the engineer was negligent as to keeping a lookout and exercised reasonable care was a question for the jury.—*K. C. M. & B. R. R. Co. v. Watson*, 91 Ala. 483, 8 So. Rep. 793; *E. T. V. & G. R. R. Co. v. Bayliss*, 77 Ala. 429; *S. & N. R. R. Co. v. Jones*, 56 Ala. 507; *E. T. V. & G. R. R. Co. v. Baker*, 94 Ala. 632, 10 So. Rep. 211.

HEAD, J.—We think, under the evidence in this case, it was for the jury to determine whether the cattle came upon the track so suddenly and near to the engine that the persons operating the train could not, by the exer-
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cise of reasonable care and diligence, prevent the injury, and also whether those persons observed the proper lookout and exercised reasonable diligence or not. This being so, the defendant was not entitled to the general affirmative charge in its favor. Nor was it entitled to have the general charge upon the effect of the defendant's evidence given in its favor, for the reason, if for no other, as we have many times said, that such a charge confines the jury to a consideration of a part only of the testimony, when, in making up a verdict, they should consider it all together. This is not opposed to anything said by this court in the case of *A. G. S. R. R. Co. v. Moody*, 92 Ala. 279, 9 So. Rep. 328.

The charge given at the instance of the plaintiff is supported by so many adjudications of this court that we need not comment upon it or cite the cases. We do not find such an undisputed state of facts, as defendant's counsel argue, as takes the charge without the influence of the general rule.

We can not affirm that if the engineer saw the cattle a quarter of a mile before reaching them, when they were standing near the track and indicating no intention of moving to the track, and would not probably have been injured where they were, he was under no further duty to look out for their safety. Charge six requested by defendant was, therefore, properly refused.

Charges 2 and 3 requested by defendant were properly refused. They both require the plaintiff to prove negligence on the part of the defendant, committed prior to the time the cattle got upon the track. If the injury resulted from negligence committed subsequently to the time the cattle got on the track, the defendant is liable, although there may have been no negligence prior to that time. On the subject of the burden of proof, generally, in cases like the present, our decisions, since the act of Feb. 28, 1887, amending section 1700 of the Code of 1876, (which act may be found in a note on page 300 of the Code of 1886) gave rise to some confusion. In *Birmingham Mineral R. R. Co. v. Harris*, 98 Ala. 98, 13 So. Rep. 377, we had occasion to review the subject, and we there announced the true rule, arising upon the proper interpretation of the change made in the law by the act above referred to. That case gives all necessary light on the question of the burden of proof.

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There is no error in the record and the judgment is affirmed.

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Statutory Actions of Ejectment.

1. *Wills; construction when inartificially drawn.*—In considering a will the effort should be to arrive at the intention of the testator; and in arriving at this intention, when the will is so inartificially drawn as not to be easily understood, the court will consider the whole instrument and the circumstances surrounding the testator at the time of the execution.

2. *Defeasible estate; conditional fee.*—Where a testator gives to his grand-son certain property, with the condition that if the grand-son should die leaving no legitimate issue at his death, then the property should go to another named devisee, the grand-son takes a conditional fee, defeasible on his dying without issue; and, on his death without issue, the latter devisee, the contingent remainderman, becomes entitled to the property devised, for the recovery of which he may maintain an action of ejectment.

3. *Evidence; transcript of will.*—Where a will has been duly probated, a transcript of it from the records of the probate court, together with the proof of probate and the order of the court, properly certified, is, under the statute (Code, § 1984), admissible in evidence to the same extent as if the original will was produced; and the fact that such transcript was made out for and used in another case, does not render it less admissible in evidence.

APPEALS from the Circuit Court of Colbert.

Tried before the Hon. H. C. SPEAKE.

These two cases were statutory actions of ejectment, brought by John E. Newsom on January 9, 1892, against James E. Holesapple and I. P. Guy and wife, respectively, for the recovery of certain lands specifically described in each of the complaints. In the case against Holesapple, No. 155, the lands sued for were thus described in the complaint: "The northwest quarter of the northeast quarter of section one (1) in township four (4), and range fourteen (14) (except two acres upon which

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defendant's dwelling-house is located,) and which two acres are not claimed by plaintiff or sued for in this action." In the case against Guy, No. 156, the complaint described the lands sued for as follows: "All of fractional section thirty-one (31) in township three (3), range thirteen (13) west. All of fractional section six (6) in township four (4), range thirteen west. The southeast quarter ($\frac{1}{4}$), of section one (1) in township four (4), range fourteen (14) west, and the northeast quarter of section one (1) in township four (4), range fourteen west (except forty acres in the northwest corner of the last described tract of land above.)" In each of the cases the defendants pleaded the general issue and adverse possession.

The plaintiff offered in each case to introduce in evidence a certified transcript from the records of the probate court of Franklin county, Alabama, in which court the will of Whitmel Rutland had been probated, which transcript included a copy of the will, the proof of execution, and the order of probate by the judge of the probate court. To the introduction of this transcript the defendant objected, and moved the court to exclude it from the jury upon the following grounds: "1. Because the paper purported to be a copy of the will of Whitmel Rutland, and the absence of the original was not accounted for. 2d. Because the will was not probated according to law. 3d. Because the copy offered was not certified according to law, and was not admissible as evidence in the case." The court in each case overruled these objections, permitted the transcript to be read to the jury as evidence, and to this ruling the defendants separately excepted. All the other facts, necessary to a full understanding of the decision in these cases, are sufficiently stated in the opinion.

In the case against Holesapple, No. 155, the court, at the request of the defendant, gave the general affirmative charge in his behalf, and refused a like charge for the plaintiff, and to each of these rulings the plaintiff duly excepted. In this case there was judgment for the defendant, and plaintiff appeals, and assigns as error the court's ruling upon the charges asked.

In the case against Guy and wife, No. 156, the court, at the request of the plaintiff gave to the jury the following written charge: "If the jury believe all the evidence

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in this case, they should return a verdict for the plaintiff for the land described, as all of fractional section thirty-one, township three, range thirteen; all of fractional section 6, township four, range thirteen, except the east half thereof." The defendants duly excepted to the giving of this charge, and also excepted to the court's refusal to give the general affirmative charge in their behalf. In this case there was judgment for the plaintiff, and defendants appeal, and assign as error the rulings of the court upon the evidence, and in giving the charge asked by the plaintiff, and the refusal to give the charge asked by the defendants.

The two cases are submitted together on this appeal.

J. B. MOORE, and ROULHAC & NATHAN, for John Newsom.—To arrive at the intention of the testator, it is the duty of the court to consult the whole will.—2 Jarman on Wills, p. 741; *Walker v. Walker*, 17 Ala. 296; *Miller v. Flournoy*, 26 Ala. 724; *Griffin v. Pringle*, 56 Ala. 486; *Hollingsworth v. Hollingsworth*, 65 Ala. 321; *Hemphill v. Moody*, 62 Ala. 510. Appellant contends, as was said by this court, with reference to this identical will in *Newsom v. Thornton*, 82 Ala. 402, 8 So. Rep. 261, that it is manifest that the "will was drawn by an unskilled draftsman, inartificially, and without proper regard to proper punctuation, capitalization, or a proper separation of the several clauses," and that the three clauses 12, 13 and 14, each being devises to Whitmel Rutland Newsom should obviously be construed together, and when so construed there is no doubt that it was the intention of the testator to vest in Whitmel Rutland Newsom an estate to be determined in the event he should die leaving no legitimate issue living at his death, as provided in the 14th clause; and having died unmarried, appellant was entitled to recover in this case.—9 Ala. 716; 18 Ala. 132; *Bethea v. Smith*, 40 Ala. 415; *McRae v. Means*, 34 Ala. 349; *McLay v. Ijams*, 27 Ala. 238.

Under the will of the testator, Whitmel Rutland Newsom took an estate which determined on his death leaving no legitimate issue living at his death; and having died unmarried, his estate was a life estate only, and during his life he could have conveyed no other interest in the property than he possessed. No act of his could affect the rights of appellant, who was executory devisee

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of the property, in the event Whitmel Rutland Newsom died without issue.—Code, § 1826; 2 Washburn on Real Prop., 649–650; *Smith v. Cooper*, 59 Ala. 494; *Pickett v. Pope*, 74 Ala. 122; Code, §§ 1830–1838, 1842; *Pickett v. Pope*, 65 Ala. 487.

KIRK & ALMON, for J. C. Holesapple.—(1.) In the construction of a will an absolute gift will not be defeated by a subsequent repugnant clause, unless such clause is plainly a qualification or condition, evidently intended by the testator to be read as a part of the preceding clause.—*Chaplin v. Doty*, 60 Vermont 712; *Stowell v. Hastings*, 59 Vt. 494. (2.) The language used by the testator shows that as to a part of the land given to W. R. Newsom he acquired a conditional estate and as to the balance he got an absolute title.—*Barnes v. Boardman*, 149 Mass. 106. (3.) The word “issue,” as used in the will and in the clause under discussion must be construed to mean heirs of the body.—*Holland v. Adams*, 3 Gray, 193; *Hall v. Hall*, 140 Mass. 269; *Palmer v. Horn*, 84 N. Y. 519. (4.) This clause of the will defeats the absolute title of Whitmel Rutland Newsom, acquired after a compliance with the conditions above mentioned. (5.) The rule is well settled that such expression of the testator’s devise or wish will not convert a devise into a trust.—*In re Pennock’s Estate*, 20 Pa. St. 268; *Jaureche v. Proctor*, 48 Pa. St. 466; *Bowlby v. Thunder*, 105 Pa. St. 173. (6.) If this clause of the will is operative to control the estate which W. R. Newsom should take under the will, and the word “issue,” as used in the will, has reference to the heirs of his body, then the effect of it would be to create an estate tail as at common law, which was abolished in this State by statute before its execution.—Code of 1852, § 1300; *Smith v. Greer*, 88 Ala. 414, 6 So. Rep. 911; *Wikle v. McGraw*, 91 Ala. 631, 8 So. Rep. 341; *Slayton v. Blount*, 93 Ala. 575, 9 So. Rep. 241; 1 Washburn Real Property, (4 Ed.) 99–100.

R. C. BRICKELL and J. T. KIRK, for J. P. Guy and wife.

HARALSON, J.—Whitmel Rutland died in Franklin county in the year 1857, leaving a large landed and per-

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sonal estate, which he undertook to dispose of by his last will. The will was dated 2d January, 1855, with a codicil added, of date February 19th, 1855, and both were duly proved and admitted to probate in said county on the 9th day of February, 1857.

By the first clause of the will of the testator, he gave to his daughter, Penelope M. Newsom, one half of his land which he had bought from one A. Barton "to be divided by a line running north and south, parallel with the section lines, it being the west half of said lands;" together with a number of slaves and other personal property. He added in reference to this devise: "It is my desire that my daughter, Penelope M. Newsom, shall continue in and have free use of my dwelling-house, so long as she remains a widow." By the codicil to his will he gave to his said daughter, Penelope, "one half section of land, that is the west half of the section I live on, that was given to her in consideration of two thousand dollars paid by her husband, E. H. Newsom, on the purchase of said lands." We have quoted the language of the codicil.

These lands appear to have been given to the said Penelope absolutely; unaffected by any conditions imposed on the devices of them to her. The testator makes a number of specific bequests of personal property and money, and then he makes devises and bequests of the remainder of his land and personal property.

The will has no numbered *items*, but is written throughout without apparent reference to order or systematic arrangement. For the sake of convenience in construing the instrument, we number certain parts of it as *items* 12, 13 and 14, as has been done by council. According to that numbering, item 12 reads: (12) "I give and bequeath to my grand-son, Whitmel Rutland Newsom, upon conditions hereinafter expressed, the two quarter sections of land I bought of C. T. Barton and wife, being the northwest quarter of section one, and the northwest quarter of section No. 2, in township four and range fourteen west, west of Huntsville, and the east half of my lands according to quantity, to be divided between him and his mother by a line running north and south, parallel with the section lines, so that all the buildings may be on that part allotted to my grand-son, Whitmel Rutland Newsom, reserving however the life

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time [right] of his mother (should she never marry), the said Penelope M. Newsom, in and to the dwelling house and out houses for the benefit of the family so long as she may live." The land last referred to in this item, the east half of which the testator gave to his said grandson, is evidently the land referred to in item *one*, the west half of which he gave to his said daughter, Penelope M., and designated as land bought by him from A. Barton.

The thirteenth item is as follows: (13) "I also give and bequeath unto my grand-son, Whitmel Rutland Newsom, the following described lands: the northeast quarter of fractional section six in fractional township four, range thirteen, also the northeast quarter of section one, township four, range fourteen west, also the southeast quarter of section No. six and the southeast quarter of section No. one in township four, range fourteen also."

(14) "I give unto my grand-son, Whitmel Rutland Newsom, upon the same conditions all the remainder of of my estate, not already given away, including negroes, stocks of every kind, crops of every description that may be growing or housed, provisions of all kinds, including notes, money, accounts and claims which I may have at my death, including also the increase either by birth or purchase, after the payment of all my debts and specified legacies. My will and desire is that all the property given conditionally to my grand-son, Whitmel Rutland Newsom, shall be kept together and worked on the land, and that my brother, Turner Rutland, now living with me may be and remain on the farm and be supported by his nephew, Whitmel R. Newsom, so long as said Turner Rutland shall live.

"Now my will and desire is that should my grand-son, Whitmel Rutland Newsom, should die leaving no legitimate issue at his death, then and in that case all the property of every kind and description herein devised conditionally to him shall go to and belong to my grandson, John Newsom, and in case my grandson John Newsom should die, leaving no legitimate issue living, shall go to and belong to my grand-daughter, Francis Pamela Newsom, and her heirs forever."

The defendant in case 155 claims possession of the land under a title duly executed by said Whitmel Rutland Newsom, on the 20th of March, 1871, by which he conveyed to Sallie V. Holesapple, wife of defendant, the

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absolute title to the land sued for. The conveyance was to the said Sallie V., "and her heirs and assigns forever." Item 13 of said will, which has been copied, embraces the lands sued for. The contention of the plaintiff is, that in and by the said will of said Rutland, the said Whitmel Rutland Newsom took only a life estate in all the lands devised to him by said testator in said three items of the will, with remainder to the plaintiff, and the said Whitmel R. having departed this life, in October, 1891, unmarried and without issue, as was shown, that plaintiff, under said will, became entitled to the possession of all of said lands, including that sued for in this action; whereas the defendant insists that an absolute fee simple estate was conferred on said Whitmel Rutland Newsom to the lands mentioned in said item 13. The same contention is made between the parties in case 156. In case 155 the court gave the general charge for the defendant, and refused a like charge for the plaintiff. In case 156, it gave the general charge for the recovery of certain lands sued for, mentioned in the charge, and refused the general charge for the defendant, holding that item 13 conveyed an absolute and the other a life estate merely to said Whitmel R.

We are invited by this appeal to construe said will, and to pass upon the rulings of the court in both cases, submitted together on the same evidence. This will has been before this court in another case for construction, but not upon the point now raised. The question there presented and discussed has no bearing upon this case. It was said by the court, however, that said will was drawn without regard to proper punctuation, capitalization or a proper separation of the clauses.—*Newsom v. Thornton*, 82 Ala. 404, 8 So. Rep. 261. In arriving at the intention of a testator in a will so bunglingly drawn as this one was, we may look at the whole instrument and the circumstances which surrounded him at the time.—*Wolfe v. Loeb*, 98 Ala. 426, 13 So. Rep. 744. It is evident, after making what he thought was a competent provision for his widowed daughter, Penelope Newsom, that the chief object of his bounty was his grand-son, Whitmel, to whom he gave the larger part of his estate, with certain conditions which he desired to impose upon the gift. It is with these conditions we have to deal in construing his will. It has been seen he

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gave by the first item of the will the west half of sections of land to be divided by a line running north and south, parallel with the section lines, to his said daughter, Penelope. He identifies these sections by referring to them as the lands he purchased from A. Barton. He also stipulates, in that item, that his said daughter should have the use of the dwelling-house, so long as she remains a widow. The dwelling-house could not have been on the land he gave her, or else this last provision was useless. It satisfactorily appears in evidence it was on section 31, township 3, range 13. By his codicil he also gave to his said daughter, in consideration of \$2,000 paid by her husband, E. H. Newsom on the purchase of said land, the west half of the section he lived on, which was shown to be section 31, township 3, range 13.

Referring now to items 12, 13 and 14, it will be seen, that he opens the devises and bequests to his grand-son, Whitmel, in this language: "I give and bequeath unto my grand-son, Whitmel Rutland Newsom, *upon conditions hereinafter expressed*," certain designated real estate, including the east half of his land, and as he expresses it, "according to quantity to be divided between him and his mother [who was the said Penelope M. Newsom], by a line running north and south, parallel with the section lines, so that all the buildings may be on that part allotted to my grand-son, Whitmel Rutland Newsom, reserving however the life time [right] of his mother (should she never marry), the said Penelope M. Newsom, in and to the dwelling-house and out-houses, for the benefit of her family so long as she may live." When we take what is here said, in connection with the provisions for his said daughter, Penelope, in the first item, it is manifest, as before stated, that the east half of the section here given to his said grand-son is the same section, the west half of which he gave by the first item to said Penelope. But, what is meant by the words, "Upon conditions hereinafter expressed?" Most certainly, as to the devises of these lands, to every thing that follows, which imposed any burden or condition on the property the testator was bestowing on his grand-son, whether light or heavy, which made his tenure of it short of an absolute title, to dispose of as he pleased. This provision in favor of said Penelope for the use of

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the dwelling and other houses on the curtilage, for herself and family so long as she lived, was evidently one of the conditions to which the testator referred, in making his devise to his grandson.

In the next item, 13, out of which this litigation grows, the testator, immediately after item 12, with a comma between, as shown by the record, adds, "I also give and bequeath to my grand-son, Whitmel Rutland Newsom, the following lands," describing them. The word *also*, as here employed, means likewise, in like manner. At the end of said item 13, the testator continued: "Also, I give to my grand-son, Whitmel Rutland Newsom, upon the same conditions, all the remainder of my estate, not already given away, including negroes," &c. He adds another condition, to those already stipulated, and which applies to all the property he gave to his said grandson, viz., "My will and desire is that all the property given conditionally to my grandson, Whitmel Rutland Newsom, shall be kept together and worked on the land, and that my brother, Turner Rutland, now living with me may be and remain on the farm and may be supported by his nephew, Whitmel R. Newsom, so long as said Turner Rutland may live." But the intention of the testator, in the way of imposing conditions on the devises of the estate he bestowed on his grand-son, did not stop here; and he adds, "That should my grand-son, Whitmel Rutland Newsom, die leaving no legitimate issue living at his death, then and in that case all the property herein devised conditionally to him, shall go to and belong to my grand-son, John Newsom," &c.

We see no reason for supposing that the testator did not intend to impose these conditions on the lands described in item 13. What purpose did he have in not so doing? They did not constitute, so far as appears, a separate farm. They do not even lie together in a body, or adjoin. Besides, a part of the same land included in this item,—viz., the N. E. $\frac{1}{4}$ of fractional section 6, township 4, range 13,—which it is said was devised absolutely, is embraced in the lands devised in item 12 (being the E. $\frac{1}{2}$ of lands bought of A. Barton), which are admitted to have been devised subject to condition. This duplication of the devise, unnecessary to have been made, is in keeping with the general unskill-

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fulness apparent throughout the instrument. After all this, it is manifest he did not intend any of the lands devised to be free of the conditions he imposed on the others.

Our conclusion is, that Whitmel Rutland Newsom took no estate under his grandfather's will, except upon condition, and that having died without issue, he took a conditional fee only, in all the real estate devised to him under said will, defeasible on his dying without issue, and on his death without children, John Newsom became entitled to it, subject to the conditions therein imposed on it as to him.—Code, 1852, § 1302; *Mason v. Pate*, 34 Ala. 379; *Goldsby v. Goldsby*, 38 Ala. 404.

The transcript of the will was properly admitted in evidence. It was made out for and used in another case, but that did not render it less admissible in these causes. The will was duly probated, and it and the proof of probate, properly certified, was admissible in place of the original.—Code, § 1984.

Both cases—Nos. 155 and 156—were here submitted to be tried together. The charge in favor of the defendant, Holesapple, in No. 155 was erroneous. The general charge requested by plaintiff should have been given. In No. 156, the plaintiff, Newsom, requested the general charge for the recovery of certain designated lands sued for, which was given, and the general charge requested by defendants, Guy and wife, was refused. There was an inadvertent error in this charge of the court to the jury, given at the instance of the plaintiff, in excepting from the lands the court charged them the plaintiff was entitled to recover, the E. $\frac{1}{2}$ of section 6, township 4, range 13, instead of the W. $\frac{1}{2}$ of said section. The charge should also have excepted the W. $\frac{1}{2}$ of section 31, township 3, range 13. These lands, as we have seen, were given by the will to Mrs. Penelope M. Newsom. This error in the charge was followed in the verdict and judgment entry, and the cause will have to be reversed on that account. Otherwise than as stated, the charge of the court for the plaintiff was free from error.

The judgment in each case is reversed and remanded.

Curran & Co. v. Olmstead & Scheuing et al.

*Bill in Equity to set aside a Conveyance on the Ground of
Fraud.*

1. *Fraudulent conveyance; payment of a pre-existing debt.*—A transfer in 1891 by a failing debtor of his stock of goods, at its fair market value, in payment of a valid, pre-existing debt, is not fraudulent, if the debt was absolute, and the property conveyed was received at its reasonably fair market value, and no benefit was secured to the debtor beyond a release from the debt.

2. *Bill in equity to set aside a conveyance as fraudulent; alternative averments.*—Where, in a bill filed to set aside a conveyance as fraudulent, the charge of fraud is made disjunctively, each alternative averment of the bill of complaint must state a sufficient cause of action.

3. *Same; sufficiency of averment.*—In a bill filed to set aside as fraudulent a conveyance from a failing debtor to a creditor, a mere averment therein that the conveyance by the debtor to the creditor was for the purpose of hindering, delaying and defrauding his other creditors, and that the preferred creditor participated in such intent, is not sufficient as a statement of the cause of action; to be sufficient, the facts which constitute the fraud must be averred.

APPEAL from the Chancery Court of Calhoun.

Heard before the Hon. S. K. McSPADDEN.

The bill in this case was filed by F. Curran & Co. against Olmstead & Scheuing and the First National Bank of Anniston; and sought to set aside the sale of a stock of goods from Olmstead & Scheuing to the First National Bank.

The ground upon which the complainants sought to set aside the sale of the stock of goods by Olmstead & Scheuing to the First National Bank was, that there was fraud in said sale, and that it was made for the purpose of hindering, delaying and defrauding the creditors of said Olmstead & Scheuing, and that the consideration expressed in the bill of sale as moving from the Bank to said Olmstead & Scheuing was simulated. It is not deemed necessary to set out in detail the various phases

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of the evidence. The respondents demurred to the bill, among others, upon the following grounds: 1st. There is no equity in said bill; and 4th. No sufficient facts are averred to show that the sale is null and void, and was made to defraud the creditors.

All of the demurrers were overruled; but upon the final submission of the cause, upon the pleadings and proof, the chancellor decreed that the complainants had failed to sustain the allegations of their bill, and therefore ordered the said bill dismissed. His decree in this behalf is here assigned as error on the present appeal therefrom by complainants.

MOUNTJOY & TOMLINSON, for appellants, cited *Hodges v. Coleman*, 76 Ala. 103; *Moog v. Farley*, 79 Ala. 252; *Pollak v. Searcy*, 84 Ala. 259, 4 So. Rep. 137; *Roswald v. Hobbie*, 85 Ala. 73, 4 So. Rep. 177; *Morrison v. Morris*, 85 Ala. 196, 4 So. Rep. 667; *Calhoun v. Hannan*, 87 Ala. 277, 6 So. Rep. 291; *Mobile Savings Bank v. McDonnell*, 89 Ala. 435, 8 So. Rep. 137, *Lehman, Durr & Co v. Greenhut*, 88 Ala. 476, 7 So. Rep. 299.

KNOX & BOWIE, *contra*, cited, *Hodges v. Coleman*, 76 Ala. 103; *Meyer v. Sulzbacher*, 76 Ala. 120; *McDowell v. Steele*, 87 Ala. 493, 6 So. Rep. 288.

STONE, C. J.—In November, 1891, Olmstead made a transfer in writing to the First National Bank of Anniston, purporting to be an absolute sale of the merchandise and stock in trade of the former, in payment of an admitted past-due indebtedness to the latter. The business had been conducted in the name of Olmstead & Scheuing, as partners; but claiming that the latter was only a salaried clerk or salesman, he released all his interest to Olmstead. Thereupon he, Olmstead, executed a bill of sale or conveyance of the entire stock to the bank. F. Curran & Co. were antecedent creditors of Olmstead & Scheuing, and they filed the bill in the present case against Olmstead & Scheuing and the bank, for the purpose of enforcing the collection of their claim out of the assets so conveyed by Olmstead. The bill assails the *bona fides* and validity of the said conveyance to the bank.

The principles of law which must control this case—

made as it was in November, 1891—have been too often declared to need elaboration. They permitted a failing or insolvent debtor to pay one or more of his creditors in full, even though the known effect of such payment would be to leave the debtor without means to pay his other liabilities. The conditions were, that the debt must be absolute, and if paid in property, it must be received at its reasonably fair market value; and no benefit must be secured to the debtor beyond a release from the debt. And when the transaction is assailed by an antecedent creditor, the burden rests on the creditor who has been preferred to prove the existence, amount and justness of his claim; and when paid in property, he must also prove that the property was taken at a price not materially below its fair market value. These are the general rules; but there are exceptional cases, arising out of the relations of the parties, which sometimes impose additional burdens. There are not shown to be any exceptional features in this case.—*Lehman, Durr & Co. v. Kelly*, 68 Ala. 192; *Hodges v. Coleman*, 76 Ala. 103; *Meyer v. Sulzbacher*, *Ib.* 120; *Pritchett v. Pollock*, 82 Ala. 169, 2 So. Rep. 735; *McDowell v. Steele*, 87 Ala. 493, 6 So. Rep. 288; *Chipman v. Stern*, 89 Ala. 207, 7 So. Rep. 409; *Dollins v. Pollock*, *Ib.* 351, 7 So. Rep. 904; *Rochester v. Armour*, 92 Ala. 432, 8 So. Rep. 780; *Beachman v. Koch*, *Ib.* 452, 8 So. Rep. 707; *Robinson v. Moseley*, 93 Ala. 70, 9 So. Rep. 372; *First National Bank v. Smith*, *Ib.* 97, 9 So. Rep. 548; *Pollak v. Searcy*, 84 Ala. 259, 4 So. Rep. 137; *Calhoun v. Hannan*, 87 Ala. 277, 6 So. Rep. 291.

The statute allowing failing debtors to give preferences in the payment of their debts has been materially changed since this sale was made.—Acts of 1892-3, p. 1046.

The proof in the present record is very full that Olmstead & Scheuing, the failing debtors, were indebted to the First National Bank in the sum of seven thousand, seven hundred dollars. The goods were sold and bought at the price of five thousand, one hundred dollars. We have read the testimony with care, and our conclusion is, that it shows the market value of the merchandise did not exceed the price agreed on, and for which amount the bank cancelled the indebtedness of Olmstead & Scheuing. In this estimate we have not computed the

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landlord's rent-charge, which had a lien on the goods. Taking that into the estimate, they were taken at a price greatly in excess of their available value. Nor is there any testimony that Olmstead, or Olmstead & Scheuing secured any benefit to themselves in the transaction.

The gravamen of the bill is that the conveyance from Olmstead to the bank was fraudulent. The charge is made in the disjunctive; that is, that the conveyance was either one thing, or another—executed with one intent, or another. When this form of pleading is resorted to, each alternative averment must, for obvious reasons, express a sufficient cause of action.—3 Brick. Dig., 378, §§ 168, 169. The language employed by the pleader in this case is, “that said bill of sale and transfer by said Percy Olmstead to said First National Bank was voluntary, and the consideration of \$5,100 is simulated in whole, or in a large measure; or, if your orators are mistaken as to said consideration being simulated, then your orators allege that said bill of sale was made by said Percy Olmstead to said First National Bank for the purpose of hindering, delaying and defrauding his creditors, and the creditors of said Olmstead & Scheuing, and the said First National Bank of Anniston participated with said Percy Olmstead in said intention of hindering, delaying and defrauding said creditors.” The second of these alternative averments is manifestly insufficient. To be sufficient, the facts which constitute the fraud must be stated; but it is not necessary to state the evidence which goes to prove those facts. The first and fourth grounds of demurrer should have been sustained. We base our conclusion, however, on the merits of the case as disclosed in the testimony.

Affirmed.

Beatty v. Brown,

*Bill in Equity to Redeem Lands after Foreclosure of a
Mortgage.*

1. *Bill to enforce statutory redemption; tender must be averred.*—A bill

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filed to enforce a statutory right of redemption is without equity, unless it avers a tender as required by statute to the purchaser or his vendee; and when such tender was not practicable before bill filed, the bill, after alleging a sufficient excuse for such failure, must also aver a present tender by payment into court, accompanied by a delivery of the money to the register.

APPEAL from the Chancery Court of Tuscaloosa.

Heard before the Hon. THOS. COBBS.

The bill in this case was filed by the appellant against the appellee; and prayed to be granted the privilege allowed him under the statute for redeeming property which had been sold under a mortgage.

The bill avers the execution of the mortgage by the complainant to the defendant; failure to pay the debt secured thereby, and the foreclosure of said mortgage, setting out the amount paid at said sale, and the purchase at said mortgage sale by the mortgagee, who is the defendant to the bill. The mortgage referred to was a mortgage executed by the complainant to the defendant on certain lands, which were bought of the defendant by the complainant. The said mortgage was regularly foreclosed by a decree of the chancery court. The bill does not allege any prior tender to the defendant of the amount paid by him at the sale, and the interest and charges, required by statute of one who seeks to redeem; nor does the bill offer to do equity by the payment unto the defendant of the discrepancy in the amount paid at the sale and the mortgage debt; nor does the bill allege that the complainant has paid into court the amount required by statute; nor did he, as matter of fact, pay such amount into court.

The complainant sets up as an excuse for his failure to make such averments in the bill and to tender the amount required by statute that he was unable to ascertain for what amount he was liable, owing to certain matters alleged in his bill of complaint. These certain matters set up as an excuse may be summarized as follows: 1st. Misrepresentation by the defendant in the original sale to complainant as to the existence or extent of a certain railroad right of way over the lands, which, it is averred, the complainant did not discover in time to obtain redress for the same in the foreclosure proceedings. 2d. Failure of title to 40 acres of the land sold. 3d. Waste committed by the defendant in cutting down

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timber and removing houses from the land subsequent to the sale. 4th. That the defendant has received a large amount of rents subsequent to the sale. 5th. That the defendant had recovered, since the sale at which he purchased, over \$500, which, was alleged, was a part of the same debt for which the land was sold.

The defendant demurred to the bill, the principal grounds of which demurrer were, that the bill fails to show that the complainant has complied with all the statutory requirements which entitle him to redeem, in that he does not aver therein the tender of the amount required by statute; that there is not shown a valid and sufficient excuse for this failure; and that the bill fails to aver that the complainant offered to do equity. The defendant also moved to dismiss the bill for the want of equity. The chancellor sustained the demurrer and granted this motion; and his decree in this behalf is assigned as error on the present appeal by complainant.

T. L. BEATTY, A. B. McEACHIN and H. B. FOSTER, for appellant.—Complainant's bill to redeem alleges payment, and waste, and offers to pay the respondent any balance which might be found due upon a statement of the account between them, ordered and directed by the chancery court. This was clearly all that the law required, and it seems plain that the bill contained equity, and should not have been dismissed.—*Whitley v. Dunham Lumber Co.*, 89 Ala. 493, 7 So. Rep. 10; *Fields v. Helms*, 70 Ala. 460; *Gilmer v. Wallace*, 79 Ala. 464; *Loan Assn. v. Lake*, 69 Ala. 456; *Adams v. Sayre*, 70 Ala. 318; *McGuire v. Van Pelt*, 55 Ala. 344; *Boyd v. Hoyt*, 5 Paige Ch. 65.

HARGROVE & VANDEGRAAFF and J. J. MAYFIELD, *contra*.—If the bill does not show that a tender was made before it was filed, a tender made in it is not sufficient to authorize a decree for the redemption, unless in connection with such offer the bill shows a valid and sufficient excuse for the omission to make a tender before it was filed.—*Spoor v. Phillips*, 27 Ala. 197; *Pauling v. Meade*, 23 Ala. 505; *Carlin v. Jones*, 55 Ala. 624; *Trimble v. Williamson*, 49 Ala. 528; *Lehman v. Collins*, 69 Ala. 127.

McCLELLAN, J.—A bill to effectuate a mortgagor's

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statutory right of redemption, which right exists, of course, only after foreclosure, is without equity unless it avers the tender which the statute requires to be made to the purchaser or his vendee. This results from the terms of the statute itself (Code, § 1881), as has been declared by this court in the following among other cases: *Paulling v. Meade*, 23 Ala. 505; *Spoor v. Phillips*, 27 Ala. 193; *Carlin v. Jones*, 55 Ala. 624; *Stocks v. Young*, 67 Ala. 341; *Lehman, Durr & Co. v. Collins*, 69 Ala. 127; *Pryor v. Hollinger*, 88 Ala. 405, 6 So. Rep. 760; *Lehman, Durr & Co. v. Moore*, 93 Ala. 186, 9 So. Rep. 590; *Beebe v. Burton*, 99 Ala. 117, 12 So. Rep. 567. In no case has it been decided that tender and an averment of the fact are not essential, though there may possibly be a *dictum* in one of the cases to that effect; and there are one or two cases which, upon casual reading, might seem to support that view, but these will on examination be found to involve bills to assert and effectuate the *equity* of redemption, which exists only, of course, before foreclosure.

As respects the purchase money bid and paid for the land at the foreclosure sale, and the ten *per cent. per annum* thereon, a tender must in all cases be made, alleged and proved; and such tender when practicable must be made to the purchaser or his vendee before bill is filed. If this is not done, the bill must allege a valid and sufficient excuse for the complainant's failure to do it. Where such excuse exists and is alleged, the bill must go further and allege a present tender by payment into court and must be accompanied by a delivery of the money to the register of the court. Thus in *Beebe v. Burton*, *supra*, it is said: "The statute not specifically prescribing the mode in which the tender must be made, the absence of the purchaser or his vendee from the State is recognized as an excuse for the failure to make tender to him in person, and as occasioning a necessity to file a bill for redemption in which the tender may be made. To the sufficiency of a tender made in this way, the payment of the money into court is essential.—*Spoor v. Phillips*, 27 Ala. 193; *Trimble v. Williamson*, 49 Ala. 525; *Alexander v. Caldwell*, 61 Ala. 543; *Caldwell v. Smith*, 77 Ala. 157; *Stocks v. Young*, 67 Ala. 341.

* * * As the statute clearly makes a payment or a tender a condition to the exercise of the right, we think

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that such payment or tender must be made to the purchaser or his vendee in person, or, when that is not practicable, by the deposit of the money in court on the filing of the bill to redeem." The statute takes no account of the possible ignorance of the debtor as to the amount of purchase money to be repaid. It, to the contrary, proceeds on the by no means unreasonable assumption that he will always know or be able to advise himself of the price at which his property has been sold; and it is absolute and unequivocal in its requirement that such price and a certain *per centum* thereon shall be refunded or tendered as a condition to the exercise of the right it gives. It is equally clear in its terms as to the lawful charges required to be paid or tendered; but a case might possibly exist, though the present is not one of them, where on account of the purchaser's absence from the State, and the debtor's consequent inability to see or confer with him, a lawful claim constituting a charge on the land might be held by the purchaser without the knowledge of the debtor, and, in such case, it may be that a bill to redeem, averring a valid excuse for failing to pay or tender before suit, tendering in its allegations, accompanied by payment into court, the purchase money and ten *per cent. per annum* thereon, and offering to pay all charges that might be found to exist, would be sufficient. This, however, we do not decide. And with respect to any claim the purchaser may have for permanent improvements: Inasmuch as the amount of such claim—or rather the value of such improvements where the claim in fact exists—must be agreed on or determined by arbitration (Code, § 1889), the complainant, where he had had no opportunity to treat with the purchaser, could not know the amount of this item and need only, we should say, offer in his bill to pay it upon ascertainment. This question is not in the present case; and we have adverted to it and the matter next preceding only to make it appear that it is not here decided that where for good cause tender is not made before suit, the tender averred in the bill by payment into court should embrace in all cases lawful charges and the value of permanent improvements.

The present bill is fatally defective under the foregoing principles, wholly regardless of whether it sets forth a good excuse for a failure of tender before suit or not.

It in itself makes no tender by alleging that money is paid into court, and no money was paid into court. For this, in any view, there can be no excuse.

This suffices to sustain the decree of dismissal entered below, and we will not extend this opinion by a discussion of the facts put forward to excuse failure of tender before suit further than to say that they are to our minds manifestly insufficient, a conclusion which must ensue from the absolute requirement that the purchase money, interest and lawful charges must be paid or tendered. admitting, as it does, of no inquiry having in view the reduction of the amount to be so paid or tendered to the extent of cross demands of the mortgagor against—not the *purchaser* with whom alone he is now dealing—but the *mortgagee*.

Affirmed.

Lyon et al. v. Dees.

Bill in Equity for the Redemption of Lands, and for the Cancellation of Deeds.

1. *Bill to redeem; multifariousness.*—A bill filed to redeem lands covered by several mortgages to the same defendant, and to have cancelled a deed executed by the sheriff under an execution sale, the judgment debt being paid, and to have cancelled a deed from the mortgagee defendant to his sister, which was made without consideration, is not multifarious, since the court having jurisdiction for one purpose will, upon proper proof, settle all questions necessary to the granting of the relief prayed.

2. *Same; mortgage chargeable with proceeds from the sale of land.*—On a bill filed for redemption from various mortgages given to secure the same debt and for an accounting, the mortgagee is properly chargeable with the price of a part of the land sold under one of the mortgages, though a defective deed was made to the purchaser, and the latter had not paid the amount bid at the sale, when it appears that the conveyance was intended to operate as a deed, and the sale has been ratified by the mortgagor who is the complainant.

APPEAL from the Chancery Court of Choctaw.

Heard before the Hon. W. H. TAYLOR.

The bill in this case was filed on December 29, 1886,
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by the appellee, W. J. Dees, against J. M. Lyon, M. J. Lyon, his sister, and Calvin Dees; and prayed for an accounting between the defendant J. M. Lyon and the complainant, and that the complainant be allowed to redeem certain lands, which were conveyed to the defendant J. M. Lyon by a mortgage, and afterwards sold under the power of sale; and that the deed from the sheriff to J. M. Lyon, conveying the lands sold under an execution sale be set aside, and that the deed from J. M. Lyon to M. J. Lyon, his sister, be cancelled as being voluntary and void. The respondents interposed a demurrer to the bill, on the ground of multifariousness. This demurrer was overruled. Such other facts as are necessary for an understanding of the questions decided on this appeal are sufficiently stated in the opinion.

On the final submission of the cause, on pleadings and proof, the chancellor decreed that the complainant was entitled to the relief prayed for. The present appeal is prosecuted by the respondents, who assign as error the interlocutory decree overruling the demurrer, and the final decree of the chancellor.

H. T. TAYLOR, for appellants.

W. F. GLOVER, *contra*.

COLEMAN, J.—The amended bill shows that appellant J. M. Lyon, the defendant, was the assignee of a judgment recovered by one Ward for the sum of \$482.70 against W. J. and Calvin Dees; that after the death of Ward the judgment was revived in the name of the assignee, with the consent of the judgment debtors, for the full amount of the judgment. The bill further avers that J. M. Lyon was the mortgagee of three several mortgages executed by complainant Dees, one dated 18th of May, 1878, for \$500, one dated 27th of August, 1878, for \$514, and one dated March 6th, 1882, for \$350. The bill avers that the two mortgages of the year 1878 were executed to secure the same debt and embraced 1,300 acres of land, the subject of this controversy. The bill also avers that Ward, the judgment plaintiff, agreed with complainant and Calvin Dees, the judgment debtors, to take \$200 for the judgment, that this amount was advanced by J. M. Lyon as a loan to them, under the

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agreement that the judgment was to be assigned to him merely as a security for this loan. The bill further avers, that the consideration of the mortgage of March 6th, 1882, for \$350 included the \$200 loaned to pay Ward for the judgment, some advances which were to be made by Lyon to assist them to make a crop, and usurious interest, and that this latter mortgage was upon other lands and property not embraced in the mortgage of 1878. The bill avers that Lyon had proceeded to enforce both the judgment for its full amount, and also the mortgage given to secure the same debt. The bill avers that J. M. Lyon had used his advantages as mortgagee and assignee oppressively and unjustly. That he had extorted large sums of money as forbearance money and had taken possession of all the lands, and all the property conveyed in the mortgages. The bill avers that complainant had fully paid his entire indebtedness, prays for an account, and that he be let in to redeem, and offers to do equity. The defendants demurred to the bill on the grounds of multifariousness, in that the bill seeks to redeem under a judgment and also under mortgages.

The foregoing statement of the averments of the bill is a sufficient answer to show that the bill is not subject to the objection of multifariousness. The object of the bill is to redeem the lands from the same debtor covered by several mortgages, and to cancel the deed of the sheriff executed to J. M. Lyon, and to cancel the deed of J. M. Lyon to his sister, Mary J. Lyon. The court having jurisdiction for one purpose, will settle all questions necessary to granting the relief prayed upon proper proof. *Lyons v. McCurdy*, 90 Ala. 497, 8 So. Rep. 52; *Bullock v. Tuttle*, *Ib.* 439 and 440, 8 So. Rep. 69.

To so much of the bill as averred that the judgment was assigned to J. M. Lyon as a mere security for a loan of two hundred dollars, the respondent pleaded that the judgment was revived for the full amount, with the consent of the complainant. This question was considered and adjudicated adversely to respondents by this court on a former appeal.—*Lyon v. Dees*, 84 Ala. 595, 4 So. Rep. 407. We will not consider this question further.

Upon submission of the case upon pleadings and proof, the chancery court held that plaintiff was entitled to relief, and ordered the master to state an account, and

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to eliminate from the account all usurious interest charged and collected. The register held a reference, stated the account, and reported that the debt secured by the mortgages of 1878 had been overpaid by \$366.31, and that upon the mortgage of 1882, which included the amount loaned to secure which the judgment was assigned, there was a balance due J. M. Lyon of \$9.53. We think there is an error in the statement of the latter account, and upon a proper statement it will be seen that this debt, also, has been overpaid. On this latter statement the register found that on November 1, 1882, there was a balance due J. M. Lyon of \$186.40. The interest should have been calculated on this amount to June 15, 1885, to which should have been added court costs paid, \$65.41, with interest thereon to June 15, 1885. These sums, with interest included, amount to the sum of \$292.27 due J. M. Lyon on the 15th of June, 1885. This amount should be credited of that date with \$240, the purchase price of 160 acres of land sold that day, and which are not sought to be redeemed, and also with \$22.30, received from sale of personal property sold January 15, 1885. Adding these together, we have \$262.30, to be credited upon the balance, \$292.27, due J. M. Lyon, and we have a balance due Lyon June 15th, 1885, of \$29.97. Add to this the interest to October 15th, 1885, and there was due Lyon on that day \$30.76. On the 18th of October Lyon collected the alternate value of a horse, \$40, and damages for detention, \$17.50, which overpaid him about \$27. As the error was in favor of appellant, it can not avail him on appeal. There were many exceptions reserved to the finding of the register based principally on the testimony of J. M. Lyon. His evidence was in conflict with the testimony introduced by the complainant. We agree with the chancellor that the weight of the evidence sustains the conclusions of the register and the exceptions were properly overruled.

It is contended by appellant that he should not be charged with \$240, the purchase price of the 160 acres of land knocked down to one Seale as the purchaser. This contention is based upon two grounds; first, that J. M. Lyon, the mortgagee, never executed a valid deed to Seale; and, second, that Seale has never paid the purchase money, or any part of it. On this question the answer of respondents avers that "Exhibit D is a sub-

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the conveyance of land to her, which he admits in his answer was worth \$5,000. He was "righteous over much." On the same day and at the same time of the execution of the deed to her, she executed back to him a power of attorney which absolutely empowers him to manage, control, sell and dispose of this property, as fully as if it was his own, ratifying all his acts in the premises. More might be stated, but enough has been said, to show that to sustain this transaction, human credulity must be subjected to a severer strain than justice to the rights of other persons will admit.

By the assignment of the judgment and the execution of the several mortgages, the debtor was completely in the power of his creditor. All the resources of the debtor were tied up, and his credit destroyed. The mortgagee used his power oppressively. A court of conscience will require the debtor to pay the last farthing he justly and legally owes. Having done this, it delights to loosen the iron grasp of the creditor and let the unfortunate debtor go free.

The answer of respondents avers a willingness, upon full payment, "to relinquish all claims to any and all property acquired by said J. M. Lyon from them or either of them," and to "surrender all of their claims to said lands." We are of opinion the chancery court has meted out exact justice and equity to the respondents, and its decree is in all respects affirmed.

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ACTION—Continued.

- not at the time the trespass complained of was committed. *Turner Coal Co. v. Glover*, 289.
5. *Necessary averments in complaint to recover penalty under section 3296 of the Code; action of debt.*—In an action brought to recover the penalty imposed by section 3296 of the Code, a complaint which avers that the plaintiff is the owner of the land upon which the trees were cut, the number and description of the trees, and that they were willfully and knowingly cut by the defendant without the plaintiff's consent, contains all the facts required to be alleged by the statute, and will be treated as an action in debt. *Ib.* 289.
 7. *Execution of mortgage by plaintiff no defense to action to recover statutory penalty for cutting trees.*—Against all persons except the mortgagee, the mortgagor, whether before or after default, is regarded as the owner of the property mortgaged; and, therefore, in an action to recover the statutory penalty for willfully and knowingly cutting trees, the fact that the plaintiff had executed a mortgage on the land from which the trees were cut to a third person constitutes no defense for the defendant, who claims no right under said mortgage. *Ib.* 289.
 8. *Action for death of employé; when not maintainable under sub-section 4 of section 2590 of the Code.*—When it is shown that an employé did not come to his death as a proximate result of having, in the discharge of his duties, gone into the place where he was killed, but by the supervening negligence of another or through an unaccountable accident, the personal representative of such employé can not recover damages from the employer under sub-section 4 of section 2590 of the Code, on the ground that his intestate suffered death in consequence of his going to and being in the place where he was killed by the direction of one in the employment of defendant, whose orders he was bound to obey. *Dantzer v. DeBardeleben C. & I. Co.*, 309.
 9. *Same.*—If obedience by plaintiff's intestate to the orders of his superior is shown to bear the relation of proximate cause to his death, in order to hold the employer responsible under sub-section 4 of section 2590 of the Code, it must be further shown by the evidence that the superior was negligent in giving the order. *Ib.* 309.
 10. *Promises to pay the debt of another.*—A promise of one person to pay a debt due from him to another, for a valuable consideration, enures to the benefit of the latter, if he elects to claim the benefit thereof; and he may sue in his own name to recover the amount so agreed to be paid. *North Alabama Development Co. v. Short*, 333.
 11. *Escape of steam from railroad engine no cause of action.*—Where steam is necessarily allowed to escape from a railroad engine, in order to slacken the speed of the train, for the purpose of turning a sharp curve in the track, the company is not liable for injuries occasioned by a mule, driven on a public road running parallel to the railroad track, becoming frightened at the noise of the escaping steam and running away, provided the escape of steam was not more than was usual, and such as was necessarily incident to the control of the engine at that time, and was not recklessly or wantonly caused by the employés of the railroad company. *Oxford Lake Line Co. v. Stedham*, 376.
 12. *Action of assumpsit against a county; when not maintainable.*—An action of assumpsit can not be maintained against a county, to recover the amount paid for the hire of a servant to keep up the fires in the county jail, and to supply it with water.—*Marango County v. Lyles*, 423.

ACTION—Continued.

13. *Action against wife for injuries caused by a dog owned by her.*—Where a dog, which is owned by a married woman, and known to be ferocious and vicious, is kept on the premises owned by her, where she and her husband reside, and escaping therefrom inflicts injuries, the wrongful act is the keeping of the dog, and the husband, being the head of the family and having control of the premises, is liable for such injuries, and no action therefor can be maintained against the wife. (McCLELLAN, J., dissenting.) *Strouse v. Leipf*, 433.
14. *Commencement of a suit; suing out a summons.*—A summons is not sued out so as to be the commencement of a suit (Code, § 2631), until it passes from the hands of the clerk, properly signed by him, to the sheriff or other proper officer to be executed, or is sent by mail or otherwise to such officer with a *bona fide* intention to have it served. *West v. Engel*, 509.
15. *Action on insurance policy; pleadings.*—In an action on an insurance policy, pleadings that allege that the building insured belonged to the estate of the deceased person, who owned no other real estate, that the said building and lot on which it was situated were subject to the homestead and dower right of the deceased's widow, who was one of the insured, that the other insured was a creditor of the deceased, and that the personal assets of his estate were insufficient to pay his debts, show an insurable interest in said building in both of the insured. *Creed v. The Sun Fire Office of London*, 522.
16. *Action under sub-section 2 of section 2590 of the Code; sufficiency of complaint.*—In an action against a municipal corporation by a laborer employed by it, to recover damages for personal injuries, a count of the complaint which alleges that the defendant, through its agents and employés, intrusted with the superintendence of the work of digging gravel, buried a dynamite cartridge where said gravel was being dug, and that the plaintiff, being employed by defendant, was required to work at the place where the dynamite was buried, without being told that it was there, and that while digging as directed, not knowing the dynamite was buried at such place, struck said cartridge causing it to explode and inflicting upon him serious personal injuries, sets forth a good cause of action under sub-section 2 of section 2590 of the Code, which gives a right of action to an employé "When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence." *City Council of Sheffield v. Harris*, 564.
17. *Action on the case; destroying landlord's lien.*—An action on the case will not lie against one who, with notice of a landlord's lien, receives from the tenant property subject to said lien, unless it appears that he has disposed of the property or its proceeds, so that the lien can not be enforced against either. *Ehrman v. Oates*, 604.
18. *Same; averment of complaint.*—When, in an action on the case to recover damages for the taking by defendant of cotton or its proceeds, on which the plaintiff alleged that he had a landlord's lien, there is no averment in the complaint that the defendant has converted or removed the cotton or its proceeds so that the lien can not be enforced thereupon, such complaint is defective, and subject to demurrer. *Ib.* 604.

ADVERSE POSSESSION.

1. *A claim of forfeiture by landlord and a denial of forfeiture by tenant*

ADVERSE POSSESSION—*Continued.*

do not show adverse holding; exclusion of such evidence not error.—The facts that the landlord claimed a forfeiture of the lands because of the wrongful severance by the tenant of timber from the leased premises, and that the tenant denied the forfeiture, and put the landlord to an action of ejectment to recover the land before the lease expired, which action was pending and being resisted by the tenant when the landlord brought an action of trover against the said tenant to recover for the conversion of the timber wrongfully severed, do not tend to show that the tenant held the land adversely to the landlord; and the exclusion of such evidence in the action of trover is not erroneous, and affords no ground of complaint to the defendant therein. *Brooks v. Rogers*, 111.

2. *Possession by grantor after execution of deed.*—Where the owner of land has executed and delivered a deed thereto, but has never parted with his actual possession, his possession is not that of owner, but of a tenant of the grantee; and his possession can not become adverse to his grantee without an open and distinct disavowal, and the assertion of a hostile title, brought to the actual knowledge of the said grantee. *Yancey v. S. & W. R. R. Co.*, 234.
3. *Conveyance of right of way; adverse possession of grantor.*—If, after the execution of a conveyance of a right of way to a railroad company, in consideration of the road being built on and along the grantor's land, and upon condition that if the road is not built upon such right of way the deed was to be null and void, the company located, levelled and graded the road along this line, the title passed to the grantee, and it became actually possessed of said right of way; and if, after the lapse of five years from the date of the conveyance, the grantor commenced to cultivate the land formerly conveyed, without the knowledge of the grantee, he did not thereby assert an adverse holding, nor was his cultivation such a re-entry as to originate a right to claim a possession adverse to his grantee. *Ib.* 234.
4. *Condition of deed of conveyance; ejectment can not be maintained after its fulfillment.*—Where the consideration for a conveyance of the right of way to a railroad company was that the road should be built on and along the lands of the grantor, and the deed was conditioned that it should be void if the road was not built on said right of way, the grantor can not declare the conveyance forfeited and maintain ejectment for the land, after the road was built thereon, although not completed until after the lapse of 13 years from the date of the conveyance: neither the charter nor deed fixing any time within which the road was to be built. *Ib.* 234.
5. *Cloud on title; adverse possession.*—When, on a bill filed to remove a cloud from title, adverse possession in the complainant is relied on as a ground for the relief prayed, the bill is not demurrable, on the ground of the want of jurisdiction in a court of equity to grant the relief prayed for, since in an action of ejectment brought by the adverse party, the right of the complainant could only be effectuated by extraneous evidence. *Torrent Fire Engine Co. v. City of Mobile*, 559.

AGENCY.

1. *Agents of a corporation; appointment.*—No formalities are essential to the appointment of an agent of a corporation unless expressly provided by its charter. They may be appointed in the same manner as the agents of individuals; and if a person is allowed to act as agent for a corporation, with the knowledge and acqui-

AGENCY—*Continued.*

- escence of a superior agent, or of one in authority who has power to appoint him, the corporation will be bound by such acquiescence, and can not repudiate the agency. *Tenn. River Transp. Co. v. Karanaugh Bros.*, 1.
2. *Power of general agent under appointment by resolution of board of directors.*—An agent of a corporation, who, by a resolution of the board of directors of said company, is "authorized to take full charge of the company's business, and to enter into such negotiations and contracts as he thinks best for the company's interest," has power to do any act within the scope of the business operations of the corporation, and in the discharge of such duties, has authority to appoint an agent with power to make contracts to bind the company. *Ib.* 1.
 3. *Same; power of local agent appointed by general agent.*—Where a general agent of a corporation, with plenary powers conferred by resolution of its board of directors, introduces to third persons his appointee as the local agent of the corporation, with the assurance that any transaction had with the said local agent would be entirely satisfactory to and approved by the corporation, the corporation can not be relieved of its liability on a contract made by such local agent with the parties to whom he was introduced, by showing that the contract was, in fact, in excess of his powers. *Ib.* 1.
 4. *Evidence of agency.*—In an action against a corporation founded upon a contract alleged to have been made with the defendant's agent, it is competent to prove, as tending to show the existence of the agency, that the alleged agent had made contracts with other persons as such agent, which were ratified by the defendant corporation. *Ib.* 1.
 5. *Agent of corporation at a particular place; irrelevant testimony.*—In an action against a corporation, founded upon a contract made with defendant's agent, the question at issue being whether the person with whom the plaintiff dealt was, in fact, the defendant's agent at a certain place, evidence that he transacted business for the corporation at another place sheds no light upon the inquiry, and is irrelevant. *Ib.* 1.
 6. *Admissions of agent against his principal; admissibility as a predicate for impeachment.*—Although in an action against a corporation, founded upon a contract alleged to have been made with the defendant's agent, an admission made by such agent is not competent evidence against his principal, unless that admission was made in company with, and at the time of the act of agency which it was intended to explain; still the question which calls for such evidence may be admissible for the purpose of laying a predicate for the introduction of impeaching testimony. *Ib.* 1.
 7. *Exercise by agent of powers not expressly conferred; when binding.*—When, in the discharge of the duties imposed upon him, it becomes necessary for the agent of a corporation to take immediate action, and a consultation with the governing board would be impracticable, such agent may, in the interest of conservation, exercise powers not expressly conferred upon him; and such action is binding upon the corporation. *Ib.* 1.
 8. *Agency; authority of travelling salesman.*—A travelling salesman, making contracts of sales of merchandise by sample, goods to be delivered by the principal, and price to be paid on delivery, or on receipt of invoice, or upon the happening of some future event, has no implied authority to collect from the purchaser the money agreed to be paid, and the payment to such agent, without express authority, will not discharge the debtor from his liability to the principal. *Simon & Son v. Johnson*, 368.

AGENCY—*Continued.*

9. *Same; custom and usage.*—The fact that in a town where goods were sold by a travelling salesman by sample, there prevails a custom for the merchants to pay said salesmen for the goods purchased, does not authorize or justify the payment to such travelling salesman, the agent of a non-resident firm, unless it is also shown that the principal had notice of such custom. *Ib.* 368.
10. *Custom and usage; irrelevant evidence*—In an action on a verified account, when it is shown that the account sued on had been paid to the plaintiff's travelling salesman, who sold the goods by sample, but had no authority to receive payment therefor, evidence that in a town where the sale was made it was a custom among the merchants to pay the travelling salesman for goods purchased, is not competent in the absence of other evidence tending to show that the principal had notice of such custom. *Ib.* 368.
11. *Agency.*—Where a contract of sale and purchase of a certain quantity of coke is made between a furnace company and a coke company, upon condition that the coke company is able to induce manufacturers to build ovens sufficient in number to produce the requisite quantity of coke, and it is provided therein that the coke company will give notice to the furnace company as to how much of the entire quantity of coke can be supplied during certain periods, it being stated in said contract that such conditions are made to enable the coke company to induce the manufacturers to build the necessary ovens, for the accomplishment of which the coke company is to use its best efforts, there is no relation of principal and agent between the two companies; the coke company is in no sense the agent of the furnace company to purchase coke from the manufacturers for the latter company's benefit, but is the seller of the coke on its own account. *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 446.
12. *Insurance company; agent's mis-statements do not avoid policy.*—Where an applicant for insurance makes full and true answers to the questions contained in the application, but the agent, himself writing the application, knowingly and intentionally writes down the answers different from the statements made by the insured, the insurance company can not avoid its obligation under said policy, on the ground that the interest of the insured was not truly stated in the application, as required by the policy. *Creed et al. v. The Sun Fire Office of London*, 522.

ALLEY-WAY.—See EASEMENTS.

ALTERATION OF WRITTEN INSTRUMENTS.

1. *Unauthorized alteration of written instrument.*—Any material alteration of a written instrument after its execution, without the maker's consent, avoids it, and discharges the maker from all obligations depending upon it. *Green v. Sneed*, 205.
2. *Same; filling blanks in excess of authority.*—Where one of the parties to a written instrument, who is authorized to fill a blank in the instrument in a certain way, or by the insertion of a certain amount, inserts in the blank matters or an amount not covered by the authorization, such alteration is material, and vitiates the instrument as between the original parties thereto, although the alteration was not made with a fraudulent intent. *Ib.* 205.

APPEALS.

1. *When an appellate court reviews an action of the trial court upon the admissibility of evidence.*—To justify a review by the appellate court of a ruling by the trial court upon the admissibility of evidence, the record must show affirmatively that the trial court made a ruling, which was excepted to at the time, or that counsel called attention to the question and requested a ruling upon it, which the trial court failed or refused to make, and that counsel making the request then and there reserved an exception to the court's failure or refusal to make such ruling. *Tenn. River Transp. Co. v. Karanaugh Bros.*, 1.
2. *Bills of exceptions no part of the record; rulings on the pleading shown only therein will not be considered on appeal.*—A bill of exceptions is no part of the record of the trial court, and rulings on the pleadings which are not shown by the record proper, but appear only in the bill of exceptions, will not be reviewed by the appellate court. *Heard v. Hicks*, 102; *Brooks v. Rogers*, 111.
3. *Judgment; when insufficient to support an appeal.*—The statement in a judgment entry in an action of ejectment, just after the recital of the verdict, "and judgment is rendered against defendants for the land sued for, together with all the costs in this behalf, for which execution may issue," is not such a judgment as will support an appeal; and when the transcript contains no other judgment entry, the appeal will be dismissed. *Bell v. Otts*, 186.
4. *Indefinite exceptions; not considered on appeal.*—It is the duty of the party excepting to the ruling of the trial court, to make clear to the appellate court the error insisted on; and if a question asked a witness is too indefinite to enable the court of appeal to determine whether it sought to elicit legal or illegal evidence, the assignments of error based on an exception to the ruling of the trial court on such question will not be considered. *Clafflin & Co. v. Rodenberg*, 213.
5. *Indefinite assignments of error; not considered on appeal.*—An assignment of error that "the court erred in sustaining claimant's objections to questions showing the fraudulent intent of [the debtor] in disposing of goods. Pages 62 and 63," when there are a number of questions on the pages referred to, to which the court sustained objections, is too indefinite to be reviewed by this court; since such assignment of error does not point out to the court the questions supposed to show such intent. *Ib.* 213.
6. *Comments or notes of clerk of trial court in transcript; when not considered on appeal.*—The clerk of a trial court, in making out a transcript to be used on appeal as the record of the orders of the court and the proceedings of the trial, should transcribe only the orders and judgment of the court as they are entered, and should never incorporate in such transcript any matter or any comments or notes of his own. Such matters, or comments, or notes, if included in the transcript, will not be considered on appeal. *Frieder v. Goodman Manfg. Co.*, 241.
7. *Appeal; when original papers sent up.*—The clerk of the trial court has no authority to take from the files of any suit in his office, an original paper and send it to the appellate court, except upon the order or ruling of the judge or chancellor, when in their opinion it is necessary. *Ib.* 241.
8. *Exception to ruling of trial court; how preserved.*—The record of an exception to the ruling of a trial court can not be secured or preserved by the clerk of such court making immediately after the recital of the ruling an entry in which it is stated that the party against whom the ruling was made reserved an exception, and to which entry is signed the name of the attorney reserving

APPEALS—Continued.

- the exception; it is the duty of the court to note the exception by either party litigant to his ruling, and this noting constitutes the evidence of the reservation of such exception. *Ib.* 241.
9. *Rulings on motions; how shown to be reviewed on appeal.*—The rulings of a trial court on motions, which are not entered in the minutes, must be presented on appeal by bill of exceptions; and unless thus presented, such rulings will not be reviewed. *Ib.* 241.
 10. *Bill of exceptions; presumption when all the evidence not set out.*—When the bill of exceptions does not purport to set out all the evidence, this court will, on appeal, presume that there was other evidence in the case sufficient to support the judgment of the trial court. *Evansville P. & Tenn. River Packet Co. v. Slater*, 245; *Wadsworth v. Williams*, 264.
 11. *Error without injury; rulings on pleadings.*—The sustaining of a demurrer to a special plea, even if erroneous, is not ground for reversal, when the record shows that the defendant had the full benefit of the same defenses under other pleas. *Russell v. Jones*, 261.
 12. *Decree to support an appeal.*—A decree that settles matters of contention and the material equities in a cause will support an appeal. *Louisville Mfg. Co. v. Brown*, 273.
 13. *Same.*—An appeal lies from a decree in a suit by an assignee named in the deed of assignment for the execution of the trust, in which the debt is ascertained and ordered to be paid out of the proceeds of the assets, without giving creditors an opportunity to contest such debt, or to present and prove their claims. *Ib.* 273.
 14. *Right of intervening creditors to appeal.*—Creditors who have intervened by petition, to have their interests ascertained and rights protected in a suit by the assignee of an insolvent debtor, may take an appeal from a decree which orders to be paid to the lessor of the debtor the amount ascertained to be due, when such decree is made without giving the intervening creditors an opportunity to contest such debt, or to present and prove their own claims. *Ib.* 273.
 15. *When appeal not taken in the name of all the defendants; not dismissed upon objection raised in argument.*—When an appeal is taken by intervening creditors, not in the name of all the defendants, and without a severance, and the cause is submitted without objection on assignments of error by the appellant, the objection that the appeal was not taken by all the defendants comes too late when suggested in argument. *Ib.* 273.
 16. *No appeal lies from a judgment of a probate court in condemnation proceedings to the supreme court.*—No appeal lies directly to the supreme court from any proceeding, judgment, order or decree of the probate court made or entered therein in proceedings to condemn a right of way for a railroad, as provided by the statute, (Code, §§ 3207-3220).—*L. & N. R. R. Co. v. The People's St. Railway & Imp. Co.*, 331.
 17. *Decree of sale of decedent's lands; presumption in favor of the decree of the probate court on collateral attack.*—When, in an action of ejectment, a decree of the sale of decedent's lands is attacked, on the ground that the evidence in the proceedings in the probate court was not taken in the manner required by statute, (Code, § 2111), the order of sale of said lands by the probate court is not set out in the record, but the statement is made that the court rendered a decree ordering said lands to be sold for the payment of the debts of said estate, this court, on appeal, will presume that the order or judgment of the probate court contained all that was necessary to uphold its validity, in-

APPEALS—Continued.

- cluding the finding that proof of the necessity of the sale to pay the debts was made by disinterested witnesses, as provided by the statute, and that such order was sufficient. *Kent et al. v. Mansel et al.*, 334.
18. *What is a final decree.*—A decree in chancery, which settles all the equities between the parties, leaving only matters of account to be adjusted on a reference before the master, is such a final decree as will support an appeal. *Foley v. Leva*, 395.
 19. *Limitation of appeal; when assignments of error are stricken out.*—Where an appeal is sued out in a chancery cause more than a year after the rendition of a decree which settled all the equities between the parties, such decree can not be reviewed, and all the assignments of error relating to matters embraced in that decree should be stricken out, upon motion, because the appeal was barred at the time it was taken. *Ib.* 395.
 20. *Bill in equity to have a lien declared; what is a final decree.*—Where, in a bill filed by heirs to have a lien declared in their favor upon a certain lot, alleged to have been purchased and improved by the administratrix of their decedent's estate, partly with the funds of the estate, which lot had been mortgaged by her to her co-defendants, it is shown that a part of the debt secured by said mortgage was an individual debt of the administratrix secured by a prior mortgage given by her on said lot, and which was assumed by her co-defendants, a decree holding the mortgage by the administratrix to her co-defendants to be a superior lien on the lot, to the extent of the debt assumed by the mortgagees, and that as against the remainder of the debt secured by said mortgage complainants were entitled to relief, at the same time giving particular instructions and directions to the register as to the manner of taking and stating an account between the parties, settles all the equities of the bill as between the complainants and the defendants, and is a final decree, from which an appeal may be prosecuted. *Ib.* 395.
 21. *Rulings on motion to vacate an order in a judgment entry; should be shown by bill of exceptions.*—Where a motion to set aside and vacate an order contained in a judgment entry is overruled, and an exception is reserved thereto, such ruling to be reviewed by the appellate court, must be presented by a bill of exceptions, and when the transcript contains no bill of exceptions presenting for review such ruling, which is the only question intended to be presented, the appeal will be dismissed. *Stern v. Collier, et al.*, 424.
 22. *Decree upon demurrers; when insufficient to authorize appeal therefrom.*—An entry, "submitted for decree upon demurrers to the bill and demurrers sustained," is not a decree sustaining the demurrers to a bill from which an appeal may be taken as provided by statute, (Code, § 3612); and when this is the only entry shown in the transcript of the docket entries of the chancellor, the appeal will be dismissed. *Mann et al. v. Hyams, et al.*, 431.
 23. *Refusal to grant new trial; when reversed on appeal.*—This court will not reverse an order refusing a new trial on the ground that the evidence was not sufficient to support the verdict, or that the verdict was contrary to the evidence, unless, after allowing all reasonable presumption of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that said verdict was wrong and unjust. *Morris v. West et al.*, 534.
 24. *When rulings by judge of probate in election contest not reviewed on appeal.*—Under the statutory provision, that "In contested election cases tried by the judge of probate, an appeal lies to the

APPEALS—Continued.

- circuit court, to be tried *de novo*," (Code, § 482), rulings made by the judge of probate in contest proceedings instituted before him, even though erroneous, which were not carried into the rulings of the circuit court on appeal from the probate court will not be reviewed by the supreme court. *Turnipseed v. Jones*, 593.
25. *Appeal; decree discharging injunction*.—An appeal does not lie from a decree of a chancellor rendered in vacation discharging an injunction. *Winter v. City Council of Montgomery*, 649.
 26. *Same; what considered when no answer filed to a bill for an injunction, and no grounds for the dissolution are given*.—On an appeal from a decree dissolving an injunction, but the grounds upon which the writ are dissolved are not stated, and there was no answer filed to the bill seeking the injunction, the consideration will be confined to the pleadings of the bill as they appear upon its face. *Ib.* 649.
 27. *Abstract charge*.—The giving of a charge that is merely abstract does not, as a general rule, work a reversal of the judgment; but where it is manifest to the appellate court that the giving of such abstract charge misled the jury to the prejudice of the party cast in the suit, the judgment consequent thereupon will be reversed.—*Goldsmith v. McCalljerty*, 663.

APPOINTMENTS.

1. *Power of appointment to office not inherently an executive function*.—The power to appoint to office is not inherently an executive function; but by the policy of our government has been distributed among the several departments of State. *For v. McDonald*, 51.
2. *Power of Governor to appoint to office*.—The Governor, as the chief executive, has no inherent right to appoint to office, and this function belongs to him only when conferred by statute. *Ib.* 51.
3. *Ratification of appointment*.—There can be no ratification by the appointing power of the prior appointment of a public officer; but if the person has been informally appointed, or one duly appointed has failed to qualify, the appointing power can only fill the vacancy. *Ib.* 51.

ASSIGNMENT OF ERRORS.—See APPEALS and ERROR.

ASSIGNMENTS, GENERAL.

1. *Right of assignee to invoke jurisdiction of equity for the administration of the trust*.—When, after the execution of a deed of assignment by an insolvent debtor for the benefit of all his creditors, the lessor of the debtor sues out a writ of attachment and has it levied upon a portion of the property conveyed in said deed, the assignee named in the deed may invoke the aid of equity to administer the trust created thereby. *Louisville Mfg. Co. v. Brown*, 273.
2. *Right of court of equity to order sale of property assigned*.—After a court of chancery has taken jurisdiction of the trust created by deed of assignment, it has the power to order a sale of the property assigned in said deed and such power extends over a leasehold interest in a store, which was conveyed in the deed of assignment, as well as to the other property assigned. *Ib.* 273.
3. *Right of creditors to be made parties defendant by petition to a suit by assignee*.—Creditors of an insolvent debtor can not be made parties defendant, by their own petition, to a suit by the assignee in a deed of assignment made by an insolvent debtor for

ASSIGNMENTS, GENERAL—*Continued.*

- the benefit of his creditors; but being beneficiaries of the trust created by said deed, they may intervene by petition to have their interest ascertained and their rights protected. *Ib.* 273.
4. *Mortgage to secure pre-existing debt a general assignment.*—Where an insolvent debtor mortgages all of his property to secure a pre-existing debt, and this mortgage is satisfied prior to its maturity by the sale of part of the goods and the procurement of money by the mortgagor from another person by a second mortgage conveying the same property, the first mortgage is declared to be a general assignment for the benefit of the debtor's creditors, (Code, § 1737), and the money received by the first mortgagee, in satisfaction of his mortgage, is a trust fund in his hands, subject to the claims of the mortgagee's creditors. *Anniston Carriage Works v. Ward*, 670.
 5. *Bill to have mortgage declared a general assignment; second mortgagee not a necessary party.*—Where a bill is filed to have a mortgage executed by an insolvent debtor to secure a pre-existing debt declared a general assignment, the second mortgagee, from whom the debtor obtained money to satisfy the mortgage executed to the first mortgagee, is not a necessary party. *Ib.* 670.

ATTACHMENTS.

1. *Landlord's lien; can be enforced independently of attachment.*—A lien secured to the landlord of a storehouse, dwelling-house, or other building by section 3069 of the Code of 1-81, can be enforced independently of the remedy by attachment given in section 3070 of the Code. *Carmen & Begg v. Ala. Nat. Bank*, 189.
2. *Attachment; resort thereto no bar to bill by landlord to enforce his lien.*—The remedy by attachment being cumulative, a resort to that writ for the enforcement of rent already matured, is no bar to a suit in equity by a landlord to enforce his lien against the proceeds of sale under attachment, issued at the instance of other creditors of the tenant, for the rent not matured. *Ib.* 189.

ATTORNEY.

1. *Arguments of counsel to jury.*—Great latitude must be allowed to counsel in addressing the jury, but his argument should be confined to the evidence before them, and the legitimate inferences to be drawn from that evidence; and when counsel transcends this limit, the court should interfere, on proper objection made, and the failure to do so is a reversible error. *L. & N. R. R. Co. v. Hurt*, 34.
2. *Same; general objection thereto.*—A general objection to statements made by counsel in his argument, some parts of which were authorized by the evidence, is properly overruled; the court not being bound to separate the legal from the illegal. *Ib.* 34.
3. *Attorney's fees are not recoverable in a suit on a replevy bond.*—In an action on a replevy bond, given by defendants in detinue, which contains no stipulation for the payment of damages, attorney's fees are not recoverable; sureties are bound only to the extent expressed in their obligation or imposed by law. *Heard v. Hicks*, 102.
4. *Malicious prosecution; advice of magistrate issuing warrant as a defense.*—In an action for malicious prosecution, the fact that the defendant in instituting the prosecution acted under the advice of the magistrate issuing the warrant, who was also a practising attorney, does not constitute a valid defense. (COLEMAN, J., dissenting.) *Marks v. Hastings*, 163.

BILL OF EXCEPTIONS.

1. *Bills of exception no part of the record; rulings on the pleading shown only therein will not be considered on appeal.*—A bill of exceptions is no part of the record of the trial court, and ruling on the pleading which are not shown by the record proper, but appear only in the bill of exceptions, will not be reviewed by the appellate court. *Heard v. Hicks, 102; Brooks v. Rogers, 111.*
2. *Bill of exceptions; return to certiorari.*—Where there is a difference between a bill of exceptions sent up as a return to a writ of certiorari and the transcript of the cause as originally filed, the former must be regarded as the true and correct record. *A. G. S. R. R. Co. v. Dobbs, 219.*
3. *Same; document or paper made part thereof by reference.*—When a document or paper is sought to be made a part of a bill of exceptions by reference and without copying it, it must be so accurately described by identifying features that the transcribing officer can, unaided by memory, readily and with certainty determine what document or paper is referred to, without room for mistake. *Ib. 219.*
4. *Same.*—Where, in a file of papers in a cause there is a showing for a continuance on account of the absence of a witness, Hickman, which showing contains the title of the cause, a statement of the reasons of the witness's absence, of what he would testify if present, and it does not appear that there was any other witness in the cause by the name of Hickman, the clerk properly fills a blank left in a bill of exceptions by copying this showing therein immediately after the statement and direction that "the defendant then offered the admissions of what the witness, Hickman and others would swear if present. (These admissions are with the file of papers in the circuit clerk's office, and the clerk will set them out.)" By such reference and direction the paper containing the showing was sufficiently identified to leave no room for mistake. *Ib. 219.*
5. *Same; charges copied by reference.*—Where a bill of exceptions recited that the court gave the following written charges at request of plaintiff, to the giving of each of which defendant "made separate objection, * * * and the clerk will set out each of said charges;" and that defendant requested the court to give the following written instructions to the jury, each of which the court refused to give, to which refusal defendant made separate exception, and "the clerk will here set out said charges," the clerk properly copied in the transcript all the charges asked by plaintiff and defendant on which were written the words "given" and "refused" and the signature of the presiding judge in the latter's handwriting. Such charges were sufficiently identified, since under the statute (Code, §2756), they became a part of the record when thus endorsed by the presiding judge. *Ib. 219.*
6. *Bill of exceptions; presumption when all the evidence not set out.*—When the bill of exceptions does not purport to set out all the evidence, this court will, on appeal, presume that there was other evidence in the case sufficient to support the judgment of the trial court. *Eransville, P. & Tenn. River Packet Co. v. Slater, 245; Wadsworth v. Williams, 264.*
7. *Rulings on motion to vacate an order in a judgment entry; should be shown by bill of exceptions.*—Where a motion to set aside and vacate an order contained in a judgment entry is overruled, and an exception is reserved thereto, such ruling, to be reviewed by the appellate court, must be presented by a bill of exceptions and when the transcript contains no bill of exceptions, presenting for review such ruling, which is the only question intended to be presented, the appeal will be dismissed. *Stern v. Collier et al. 424.*

BONDS.

1. *Replevy bond: statutory requirements.*—A replevy bond given by the defendants in a detinue suit, which contains no condition or obligation to pay costs or damages, does not conform to the requirements of the statute, and is not a statutory bond; but is binding as a common law obligation. *Heard v. Hicks*, 102.
2. *Subscribers to corporate bonds: when not liable as stockholders.*—When stock, which has been subscribed, paid for and issued, upon adequate consideration, is by the holders thereof placed in the hands of a trustee to be paid over to subscribers for bonds of the corporation, when their subscriptions to such bonds are paid in full, such stock, so delivered to the trustee, may be transferred by him to the subscribers for bonds, upon payment of their subscriptions, without contravening the Constitution and statutes of the State, (Const. Art. XIV, § ; Code, §16); and the failure to pay their subscriptions for the bonds, does not make such subscribers for said bonds liable upon the stock agreed to be delivered, as upon unpaid subscription for stock. *Davis v. Montgomery F. & C. Co.*, 127.
3. *Subscribers to bonds of a corporation; liable as garnishees*—Where the contract of subscription to bonds of a corporation provides that upon the payment of the entire amount of the subscription an equal amount of fully paid-up stock of the corporation shall be paid over to the holders of the bonds, and that the subscription is to be paid in monthly instalments of fixed sums, a subscriber to the bonds under such contract, who has paid three instalments, is a debtor to the corporation for the balance due upon his subscription, in such sort as to be subject to process of garnishment by creditors of the corporation, and liable as garnishee to the extent of such balance due and unpaid upon his subscription for the bonds. *Ib.* 127.

See REPLEVY BOND.

BUILDING AND LOAN ASSOCIATIONS.

1. *Building and loan association; forfeiture of borrower's stock.*—Where a building and loan association, duly incorporated under the laws of the State (Code, §§ 1553-1556), has, in the exercise of its charter powers, adopted by-laws providing for the forfeiture of the stock of a borrowing shareholder, if he fails for three months to pay the interest or premiums on his loan, or the regular monthly instalments due upon his stock, if a borrower, to secure a loan from such association, executes a mortgage on real estate and assigns his stock as collateral security, and stipulates that these by-laws should be a part of the loan contract, the said association has the right to declare forfeited the stock subscribed for by such borrower, upon default by him for three months or more in the payment of his dues; and upon such forfeiture the shareholder is not entitled to have the mortgage debt abated to the extent of the aggregate of the payments made by him on his stock subscription prior to his default.—*Southern B. & L. Assn. v. Anniston L. & T. Co.*, 582.

CHANCERY.

I. JURISDICTION AND GENERAL PRINCIPLES.

1. *Appointment of a receiver upon a bill filed to dissolve a corporation.*—When a bill filed by stockholders to dissolve a corporation, as provided by statute (Code, § 1683), contains averments which show a necessity for the appointment of a receiver for the corporation pending the proceedings for dissolution, a chancery

CHANCERY—*Continued.*

- court may appoint such receiver.—*Florence Gas, Electric Light & Power Co. v Hanby*, 15.
2. *Powers of receiver appointed pending proceedings for the dissolution of a corporation.*—When a bill which seeks the dissolution of a corporation contains averments showing special grounds for the appointment of a receiver pending such proceedings, the receiver to be appointed by the court is authorized, not only to execute and perform the existing contracts of the corporation, but also to enter into and carry out new contracts in behalf of the company. *Ib.* 15.
 3. *Appointment of a receiver; can not be questioned in collateral proceedings.*—On a bill filed by the receiver of a corporation, who was acting under an appointment made after the dissolution of the company (Code, §§ 1683-86), the validity of his former appointment as receiver, pending the dissolution proceedings, can not be assailed; said attack being made in a collateral proceeding. *Ib.* 15.
 4. *Power of receiver of dissolved corporation to carry out existing contract.*—While a receiver, appointed under section 1686 of the Code has no authority, as a general rule, to carry out and perform existing contracts of the dissolved corporation, and can only be empowered to perform such conditions as are prescribed by said section, he may, nevertheless, complete the execution of an existing contract, when such execution is necessary to the discharge of the duties and powers expressly imposed and conferred by such statute. *Ib.* 15.
 5. *Specific performance of a contract; when not enforceable.*—When, on a bill filled by the receiver of a dissolved corporation, seeking the specific performance of a contract made between such corporation and another company, it is shown that in the contract the corporation, of which the complainant is the receiver, agreed to construct an electric light plant for the defendant corporation, and to pay off debts due from the defendant corporation, some of which were secured by a mortgage, and that the defendant agreed to issue first mortgage bonds to the construction company, to secure the debt arising from the performance of the work stipulated, with leave to take the bonds in absolute payment after a certain time, a specific performance of such a contract can not be decreed, when the bill contains no averment that the debts due from the defendant to third parties, which were agreed to be paid by the construction company, had been paid, nor an averment of an offer, or even a readiness or willingness to pay such debts; the failure of the construction company to perform its part of the contract by paying the debts, making a specific performance of the contract by the defendant, by the delivery of first mortgage bonds, impossible. *Ib.* 15.
 6. *Partition of lands; no equities involved.*—In a proceeding for the partition of lands, as provided by our statutory system, (Code, §§ 3237-3-82), the consideration and adjustment of equities between the joint owners is not involved; and a decree of the probate court granting partition settles, in no wise, any of the equities subsisting in favor of the several owners upon, or in respect of, the common property. *Austin v Bean*, 133.
 7. *Same; co-tenant not estopped thereby from asserting equities against existing mortgage.*—When there exists a mortgage on joint property to secure a debt of one of the co-tenants, a partition of the common property by decree of the probate court does not estop the other co-tenants from asserting their equity to have the share allotted to their joint owner sold first to pay such debt, in exoneration of the shares allotted to them. *Ib.* 133.

CHANCERY—*Continued.*

8. *Same; co-tenant not estopped from asserting equity by exchange of her share by warranty deed.*—The fact that one of the joint owners of common property, immediately after the partition of said lands by decree of the probate court, conveyed the share allotted to her by warranty deed, in exchange for the share of one of her co-tenants, does not estop her from the assertion of her equity to have the share so exchanged sold first, to satisfy a mortgage existing upon the whole property, given to secure a debt of her said co-tenant, the mortgage having been executed prior to the acquisition of title by the co-tenants. *Ib.* 133.
9. *Purchaser from an heir; charged with notice of equity in favor of other heirs.*—The purchaser of land from one who derives title by descent from his father, is charged with notice of any equity existing in favor of the ancestor, or the co-heirs of the grantor, affecting the land in its descent. *Ib.* 133.
10. *Mortgage by joint owner after partition does not destroy equity in favor of his co-tenants.*—When, after the partition of lands, the title to which was acquired by descent, one of the heirs mortgages the share allotted to him, his mortgagees are charged with notice of equities existing in favor of the other heirs, to have the mortgagor's share applied first, in exoneration of the shares of his co-heirs, to the satisfaction of a prior mortgage executed by their ancestors on the common property for the benefit of such heir and mortgagor. *Ib.* 133.
11. *Landlord's lien; can be enforced independently of attachment.*—A lien secured to the landlord of a storehouse, dwelling house, or other building by section 3069 of the Code of 1886, can be enforced independently of the remedy by attachment given in section 3070 of the Code.—*Carmon & Begg v. Ala. Nat. Bank.* 189.
- 1'. *Attachment; resort thereto no bar to bill by landlord to enforce his lien.*—The remedy by attachment being cumulative, a resort to that writ for the enforcement of rent already matured, is no bar to a suit in equity by a landlord to enforce his lien against the proceeds of sale under attachment, issued at the instance of other creditors of the tenant, for the rent not matured. *Ib.* 189.
13. *Bill to enforce claim for devastavit; multifariousness.*—A bill to enforce a claim for *devastavit* against personal representatives of some of the sureties on an administrator's bond, and for a settlement of the estate, and also to enforce against the personal representatives of the other sureties, in their individual capacities, the personal penalty for failure to give the notice to creditors required by law, is multifarious. *Page v. Bartlett.* 193.
14. *Same; appointment of administrator ad litem.*—Such a bill does not make a case for the appointment of an administrator *ad litem* under the statute (Code, § 2283), which provides that when in any proceeding in the probate or chancery court, the estate of a deceased person must be represented, and there is no executor or administrator of such estate, it shall be the duty of the court to appoint an administrator *ad litem* whenever the facts rendering the appointment necessary shall appear in the record, or shall be made known by affidavit. *Ib.* 193.
15. *Same; transfer of administration from probate to chancery court.*—Where an act forming a new county out of portions of two old counties makes no provision concerning the administration of estates pending in probate courts of the older counties, if it becomes necessary or proper to transfer into a court of equity the settlement of the administration of an estate situated in the new county, but which was pending in the probate court of one of the older counties, such settlement must be removed into

CHANCERY—*Continued.*

- the chancery court of the old county in whose probate court such administration was pending; the chancery court of the new county having no jurisdiction thereof. *Ib.* 193.
16. *Parol agreement for conveyance of land; when specifically enforced.*—A parol agreement for the re-conveyance of land will be specifically enforced, at the suit of the vendee of the original vendor, when the circumstances surrounding the transaction, the conduct of the parties, and the declarations of the grantee in the original conveyance show that it was the intention of the parties to rescind the former sale and re-vest the title in the grantor. *Whisenant v. Gordon*, 251.
 17. *Injunction; when granted to enjoin trespass.*—A court of equity will not grant an injunction to prevent the commission of trespasses, unless the complainant shows a satisfactory title to the *locus in quo*; and if the title be denied or in doubt, the injunction will be refused against the defendant who is in possession, until the title is established at law. *Kellar v. Bullington*, 267.
 18. *Same.*—An injunction will not lie in favor of a complainant not in possession of the actual property trespassed upon, to restrain the removal of stone from lands of which the defendants had possession under a claim of ownership, when the complainant obtained title thereto from the Government by his entry as a homestead, until the disputed question of title has been adjudicated. *Ib.* 267.
 19. *Right of assignee to invoke jurisdiction of equity for the administration of the trust.*—When, after the execution of a deed of assignment by an insolvent debtor for the benefit of all his creditors, the lessor of the debtor sues out a writ of attachment and has it levied upon a portion of the property conveyed in said deed, the assignee named in the deed may invoke the aid of equity to administer the trust created thereby. *Louisville Mfg. Co. et al v. Brown*, 273.
 20. *Right of court of equity to order sale of property assigned.*—After a court of chancery has taken jurisdiction of the trust created by deed of assignment, it has the power to order a sale of the property assigned in said deed, and such power extends over a leasehold interest in a store, which was conveyed in the deed of assignment, as well as to the other property assigned. *Ib.* 273.
 21. *Bill in equity to cancel bonds of a corporation; when properly dismissed.*—A bill in equity, filed by a *bona fide* holder of bonds of a corporation, seeking the cancellation of certain other bonds of the same corporation in the hands of stockholders of the company, on the ground that they were issued to said stockholders without the payment by them of any consideration, and are not proper charges upon the property, which does not aver that the said company has made default in the payment of interest due on its bonds, including those held by the defendant, that it has in no way misused or impaired the property mortgaged as security for the said bonds, and which does not aver that the complainant has any lien upon, claim to or control over the earnings of the said company, or upon the money received by it as a loan, is without equity and is properly dismissed. *Bibb v. Montgomery Iron Works*, 301.
 22. *If contract can not be performed, damages should be awarded in the alternative.*—When a bill in equity is filed for the purpose of enforcing the specific performance of a contract, the assessment of damages against the defendant can not properly be made until it is shown he was, or might be unable to perform his contract, and then, not without giving him an opportunity to do so;

CHANCERY—Continued.

- the damages in such cases, being awarded in the alternative. *Eastman et al v. Reid et al.* 320.
23. *Complainant's knowledge of defendant's inability to perform a contract defeats a bill filed for that purpose.*—If, at the time of filing a bill to enforce the specific performance of a contract, the complainant knows that the contract can not be specifically performed, his bill will not be entertained for the purpose of granting him compensation by the award of damages. *Ib.* 320.
 24. *Regularity of election of officers of a corporation; inquiry by court of equity.*—A court of equity will inquire into the regularity of the election of the directors of a corporation only when the question arises incidentally or collaterally in a suit of which the court otherwise has jurisdiction, and the granting of the relief prayed for depends upon its decision. *Elliott v. Sibley*, 344.
 25. *Bill to remove directors of a corporation from office; want of equity.* When, in a bill filed by a stockholder to enjoin the sale by the corporation of his stock, and which also prays for the removal from office of certain persons claiming to be directors of said corporation, there are no averments which show that complainant's defense to the claim of the corporation is in any way affected by acts of the alleged illegal directors of the corporation, the bill, while perhaps multifarious, is wanting in equity, so far as it seeks to have the said directors removed from office. *Ib.* 344.
 26. *Bill to cancel mortgage; offer to do equity.*—Before a court of equity will grant relief on a bill filed to have a mortgage declared void and cancelled as violative of constitutional and statutory provisions, the complainant must offer to do equity by refunding the money he has received under the mortgage; but an offer in such a bill, that if the debt past due is "held valid in any event, complainant hereby offers and is able and willing and ready to pay the same," is not such an offer to do equity as the law requires. *Ross v. N. E. Mort. Sec. Co.* 362.
 27. *Same; requisites for foreclosure.*—Where a bill is filed by the mortgagor to have his mortgage declared void and cancelled, there can be no decree of foreclosure of said mortgage (in the absence of a cross-bill by the mortgagee, praying a foreclosure), unless the complainant in his bill offers to do equity, and submits himself to the authority and jurisdiction of the court; but an averment in the bill that, if "the court should ascertain that said mortgage is void, and should order a reference to the register to ascertain and report the amount due from the complainant to the respondent, he is ready and willing to pay the same," is neither such an offer to do equity, nor such a submission of the complainant to the authority and jurisdiction of the court as would justify a decree of foreclosure. *Ib.* 362.
 28. *Bill to enforce a vendor's lien; questions of usury and breach of warranty to be decided by the chancellor.*—Where, in a bill in equity to enforce a vendor's lien, the answer of the respondent raises the questions of usury and a breach of the warranty in a deed of conveyance, it is error to order a reference to the register to ascertain whether there was usury in the transaction, and whether there had been a breach of warranty in the deed to the respondent; these questions should be decided by the chancellor. *Dykes v. Bottoms*, 390.
 29. *Bill to enforce trust; when it contains equity.*—A bill in equity which avers that the complainants verbally contracted to purchase a certain lot of land, and not having the means to make the cash payment agreed upon, procured a third person to ad-

CHANCERY—*Continued.*

- vance the money as a loan, and to become surety for the deferred payment, that to secure such third person against loss, it was agreed that the deed from the vendor should be executed direct to him, who should re-convey it to complainants upon being repaid the amount loaned and advanced, that the complainants had paid the amount borrowed and the deferred payment, but that the respondent, to whom such deed was made, refused to re-convey the property to them, contains equity; and upon proof of the averments, complainants will be entitled to the relief prayed for, and a decree should be rendered investing the title to the land in them. *Jordan et al. v. Garner et al.*, 411.
30. *When deed absolute in form declared a mortgage.*—On a bill, filed for that purpose, a deed, absolute on its face, will be declared a mortgage, when it is shown that the complainant purchased the lands, and upon payment of three-fifths of the purchase price received from the vendor a bond for title, that defendant, under an agreement with complainant, advanced for him to the vendor the balance of the purchase money, for which amount, with agreed interest, complainant executed his note to defendant, which note was a continuing debt, that the vendor had no negotiation with the defendant for the sale of the land, but executed the deed to him by direction of complainant, in consideration of the payment by him for complainant of the balance due upon the land, which balance was greatly less than the true value of said land. *Hughes et al. v. McKenzie*, 415.
31. *Bill to enforce the specific performance of a contract of sale; tender of deed before filing bill not necessary.*—It is not essential to the maintenance of a bill for the specific performance of a contract of sale that the complainant, who is the vendee, should offer to perform or tender a deed before filing the bill; a failure to do so affects only the question of costs. *Ashurst v. Peck*, 499.
32. *Bill in equity to enjoin obstruction of alley-way; evidence.*—Where, on a bill filed to enjoin the obstruction of an alley-way it is shown that the description in the deed granting the said way from the defendant to the complainant was indefinite, but that after the grant the way was definitely located by the defendant, and was used by the complainant, evidence of oral statements made by the parties prior to the execution of the deed, indicating a purpose on the part of the grantor to acquire at some future time other adjacent lands, and locate a way different from that which was located, is incompetent. *Wharton v. Han-non*, 554.
33. *Enjoining obstruction of alley-way; jurisdiction of equity.*—Where a deed granting an alley-way does not definitely describe the location thereof, but the way is designated by the grantor and is accepted and used by the grantee, and the said grantor afterwards obstructs the way thus designated and used, a court of equity, upon proper bill filed, will enjoin such obstruction, notwithstanding a better alley-way has been opened by the grantor and offered to the grantee, and although the use of the obstructed alley-way involves the crossing with teams, &c., of a sidewalk on a much used street in a city. (STONE, C. J., dissenting, holds that, in the absence of the averment, that the grantor was insolvent, and of facts showing that complainant could not obtain ample redress in an action at law, and in view of the fact that another and better way was tendered, the granting of an injunction is discretionary, and complainant in this case should be left to his action at law.) *Ib.* 554.
34. *Same.*—In such a bill filed to enjoin the obstruction of an alley-

CHANCERY—Continued.

way by the grantor, there should be averments that the location of the alley-way was made, and a description of the way so located; proof of location without averment is not sufficient to warrant relief. *Ib.* 554.

35. *Vendor's lien; enforcement against assignee of purchaser.*—A vendor who retains title to the land and has the right of possession, but binds himself to convey on payment of the purchase money, can maintain a suit to enforce his lien, which is in the nature of an equitable mortgage, against the purchaser's assignee in a general assignment for the benefit of creditors. *Janney & Cheney v. Habbeler*, 577.
36. *Same; jurisdiction of the court.*—Where a vendor of lands, who retains title but binds himself to convey upon payment of the purchase money, files a bill to enforce his lien against the assignee of the purchaser in the district court, having equitable jurisdiction in the county wherein the land is situated, a plea to the jurisdiction of said court, which avers the assumption of jurisdiction by a different chancery court of the administration of the trusts created by the purchaser's deed of assignment, and of all the property owned by the assignor, and decreeing that all persons asserting any rights, liens or charges affecting any of the property should prosecute the same in said chancery court, but which does not show that the complainant vendor was a party to said proceedings and had opportunity to be heard, is insufficient as a bar to the exercise of the jurisdiction of the district court in the enforcement of the vendor's rights. *Ib.* 577.
37. *Lease of one railroad company by another; equity of bill for cancellation.*—Under the statutory provisions of this State (Code, § 1586), a railroad corporation can lease its road and property to another railroad company that is continuous or connected with it by the performance by each of the companies of the requirements of said section; but a lease executed by two such railroad companies is invalid, which, while reciting that it was executed by the directors of each company, does not recite that the stockholders' meeting of one of the companies was called by its directors at a time and place and in the manner designated by them, and in reference to the other company its recitals fail to show that the lease was assented to by a majority in value of the stockholders, represented in person or by proxy at a meeting called by the directors, at such time and place, and in such manner as they might designate; and a bill filed by the stockholders of one of the railroad corporations, seeking the cancellation of said lease, which is made an exhibit to their bill, is not demurrable on the ground that said lease was valid and not contrary to law. *George v. Central R. R. & Banking Co.*, 607.
38. *Injunction against a railroad corporation voting stock in another railroad corporation.*—Where one railroad corporation has purchased a majority of the stock of another railroad corporation, with the intent and purpose of getting the management and control thereof, in order to defeat or lessen competition in the business of the two companies, or to encourage monopoly, and the corporation owning the majority of the other's stock violates duties in respect of the property and rights of the other company and its stockholders, committing willful wastes and subjecting said company to a multiplicity of suits, a court of equity will interfere, by an injunction at the suit of a minority of the stockholders, to restrain the said corporation owning the majority of the stock from the use of said stock in the manage-

CHANCERY—*Continued.*

- ment of the affairs of the other corporation and in the election of its officers. *Ib* 607.
39. *Same; jurisdiction of court of equity notwithstanding property in the hands of a receiver*—In a bill filed to enjoin a railroad corporation owning a majority of the stock in another railroad corporation from voting its stock in the management of the affairs of the latter company, and in the election of its officers, the jurisdiction of the court is not ousted, and the right to grant the relief prayed for is not affected, by the fact that the road whose stock is controlled by the other corporation is in the hands of a receiver, appointed by other courts. *Ib* 607.
40. *Same; laches*.—Where a bill is filed by stockholders in a corporation to enjoin another corporation owning a majority of the stock of the former corporation from voting its stock in the control of the affairs and in the election of the officers of the said corporation, the fact that the complainant stockholders, after full knowledge of the grounds of complaint alleged in their bill, or full opportunity to acquire such knowledge, acquiesced in the acts complained of for more than six years, does not debar them from having enjoined such use of the stock in the future. *Ib* 607.
41. *Injunction against a corporation at suit of stockholders; previous request to directors for action*.—A minority of the stockholders of a corporation can not maintain a bill in equity to prevent illegal action on the part of the majority, without a previous request to the proper officers to interfere, and their failure or refusal to do so; but when it is shown that a majority of the stock of said corporation is owned by another corporation, which practically creates and controls the managing and governing bodies of said corporation, the necessity for such a demand is dispensed with, as any such demand would be fruitless. *Ib* 607.
42. *Bill to enforce statutory redemption; tender must be averred*.—A bill filed to enforce a statutory right of redemption is without equity, unless it avers a tender as required by statute to the purchaser or his vendee; and when such tender was not practicable before bill filed, the bill, after alleging a sufficient excuse for such failure, must also aver a present tender by payment into court, accompanied by a delivery of the money to the register.—*Beatty v. Brown*, 695.
43. *Bill to redeem; multifariousness*.—A bill filed to redeem lands covered by several mortgages to the same defendant, and to have cancelled a deed executed by the sheriff under an execution sale, the judgment debt being paid, and to have cancelled a deed from the mortgagee defendant to his sister, which was made without consideration, is not multifarious, since the court having jurisdiction for one purpose will, upon proper proof, settle all questions necessary to the granting of the relief prayed. *Lyon v. Dees*, 700.

II. PLEADING AND PRACTICE.

BILL AND PARTIES THERETO.

44. *Multifariousness*.—A bill in equity is not rendered multifarious by the addition of a prayer for alternative relief, when the averments of such bill are not duplex, but are appropriate and sufficient to warrant relief under either of the special prayers. Multifariousness can not be predicated solely upon the variant prayers with which a bill may conclude. *Florence Gas, Electric Light and Power Co. v. Hanby*, 15.

CHANCERY—*Continued.*

45. *Bill to enforce claim for devastavit; demurrer for want of parties.*—A bill against the personal representatives of the sureties of an administrator's bond for a settlement of the estate and to enforce a claim for devastavit, which avers that one of the heirs of the decedent is dead, and that her estate is entitled to whatever amount she would receive if living, but which makes neither her personal representative nor her heirs parties, and does not aver that there is no administrator or executor of her estate, or children surviving her, is demurrable for want of proper parties. *Page v. Bartlett, 193.*
46. *Bill to set aside conveyances as fraudulent; denials of the answer.*—An answer to a bill of complaint that contains a mere general denial of the matters charged is not sufficient; and in response to a bill filed to set aside conveyances as fraudulent, the answer must specifically deny the allegations that charge material matters, *prima facie* within the knowledge of defendants, which render the conveyances fraudulent and void, or such allegations will be considered as admitted and true, entitling the complainant to the relief sought. *Moog v. Barrow, 209.*
47. *Amendment to bill; not allowed when repugnant to the averments of the original bill.*—Where a bill in equity is filed by the assignee of a mortgage, seeking its foreclosure, an amendment by which new parties defendant are made, and the validity of the assignment to the complainant is assailed, and compensation from the assignors is sought to be recovered, by reason of alleged fraudulent misrepresentation, is variant from, and repugnant to the purposes for which the original bill was filed, and it can not be allowed. *Baker v. Graves, 247.*
48. *Right of creditors to be made parties defendant by petition to a suit by assignee.*—Creditors of an insolvent debtor can not be made parties defendant, by their own petition, to a suit by the assignee in a deed of assignment made by an insolvent debtor for the benefit of his creditors; but being beneficiaries of the trust created by said deed, they may intervene by petition to have their interest ascertained and their rights protected. *Louisville Mfg. Co. et al. v. Brown, 273.*
49. *Bill to enjoin sale of stock; necessary averments.*—In a bill by a stockholder to enjoin the sale by the corporation of his stock in payment of his debt to said corporation, on the ground that he has a claim against the corporation in excess of his alleged indebtedness, the complaint must aver some fact other than the existence of his demand, which is a proper subject of his set-off in order to give his bill equity—such as the insolvency of the corporation, or any other fact respecting his alleged claim, which would justify the interposition of a court of equity. *Elliott v. Sibley, 344.*
50. *Bill to enjoin sale of stock; corporation necessary party.*—Where a bill is filed by a stockholder to enjoin the sale by a corporation of his stock to settle an indebtedness due to the corporation, upon the ground that the debt is not due, or has been paid, or that the corporation is indebted to the shareholder in an amount exceeding that claimed to be due the corporation, and which prays for a settlement of account, the corporation itself is an indispensable party. *Ib. 344.*
51. *Same; complainant must offer to do equity.*—In a bill filed by a stockholder to enjoin the sale of his stock by a corporation, on the ground that the corporation is indebted to him in an amount exceeding his indebtedness, and which also prays for a settlement of account, the complainant must offer to do equity by averring in his bill a readiness and willingness to pay what-

CHANCERY—Continued.

- ever amount may be ascertained to be due from him to the corporation. *Ib.* 344.
52. *Bill to set aside fraudulent conveyance; not demurrable for failure to aver that defendants were not licensed to sell liquors, which form part of consideration of complainants' debt.*—A bill filed by creditors seeking to set aside as fraudulent and void a conveyance by their debtor to other creditors, which avers that a part of the consideration of the debt sought to be enforced was spirituous, vinous or malt liquors, is not subject to demurrer because it fails to aver that the complainants were licensed to make said sales; the *prima facie* presumption of the law being that they had complied with the revenue statutes, and taken out the required license. *O'Neil v. Birmingham Brewing Co.*, 383.
53. *Same; when not necessary to aver insolvency of debtor.*—When a bill is filed by creditors to set aside a conveyance of their debtor to other creditors as fraudulent and void under the provisions of section 1730 of the Code, it is not necessary to aver the insolvency of the debtor, since the creditor has a right to pursue and subject the property conveyed by his debtor to the latter's own use and benefit, notwithstanding the debtor may have other property which might be subject to said debt. *Ib.* 383.
54. *Bill to enforce specific performance; failure to aver when purchase money payable.*—When a contract of purchase stipulates that the vendor will convey the lands when the "vendee pays or causes to be paid" the purchase money, and that the contract was based on a note then executed by the vendee and another note he would thereafter execute for the purchase money, a bill filed by one claiming under the vendee against the administratrix of the vendor to enforce the specific performance of said contract, which avers that complainant does not know whether the notes were ever executed, and makes no other averment as to when the contract was to be performed by the vendee paying the purchase money, is not open to demurrer on the ground, that it fails to show when the purchase money was payable, since the complainant could assume that the contract was to be performed by the vendee within a reasonable time. *Ashurst v. Peck*, 499.
55. *Bill to re-establish a lost deed; insufficient averments.*—A bill filed to re-establish a lost deed, which, without verification, merely states that complainant caused the lot to be bought and paid for, that the legal title was conveyed, that the deed was not recorded, but, after delivery, was lost or destroyed in some way, unknown to complainant, but fails to show how, when or by whom it was lost, what it contained, what title or interest it conveyed, or what consideration, and by whom paid, contains insufficient averments to warrant the relief prayed for, and is demurrable. *Torrent Fire Engine Co. v. City of Mobile*, 559.
56. *Cloud on title; adverse possession.*—When, on a bill filed to remove a cloud from title, adverse possession in the complainant is relied on as a ground for the relief prayed, the bill is not demurrable, on the ground of the want of jurisdiction in a court of equity to grant the relief prayed for, since in an action of ejectment brought by the adverse party, the right of the complainant could only be effectuated by extraneous evidence. *Ib.* 559.
57. *Bill filed by corporation; failure to aver a right to acquire property.* A bill filed by a corporation to quiet its title and to remove a cloud therefrom is not demurrable because it fails to aver that the complainant corporation had the power under its charter to acquire and hold the lot; in the absence of proof to the con-

CHANCERY—Continued.

trary, the corporation will be presumed to have had such power. *Ib.* 559.

58. *Bill to have mortgage declared a general assignment; second mortgagee not a necessary party.*—Where a bill is filed to have a mortgage executed by an insolvent debtor to secure a pre-existing debt declared a general assignment, the second mortgagee, from whom the debtor obtained money to satisfy the mortgage executed to the first mortgagee, is not a necessary party. *Anniston Carriage Works v. Ward*, 670.
59. *Bill in equity to set aside a conveyance as fraudulent; alternative averments.*—Where, in a bill filed to set aside a conveyance as fraudulent, the charge of fraud is made disjunctively, each alternative averment of the bill of complaint must state a sufficient cause of action. *Curran & Co. v. Olmstead & Scheuing*, 692.
60. *Same; sufficiency of averment.*—In a bill filed to set aside as fraudulent a conveyance from a failing debtor to a creditor, a mere averment therein that the conveyance by the debtor to the creditor was for the purpose of hindering, delaying and defrauding his other creditors, and that the preferred creditor participated in such intent, is not sufficient as a statement of the cause of action; to be sufficient, the facts which constitute the fraud must be averred. *Ib.* 692.
61. *Bill to enforce statutory redemption; tender must be averred.*—A bill filed to enforce a statutory right of redemption is without equity, unless it avers a tender as required by statute to the purchaser or his vendee; and when such tender was not practicable before bill filed, the bill, after alleging a sufficient excuse for such failure, must also aver a present tender by payment into court, accompanied by a delivery of the money to the register. *Beatty v. Brown*, 695.
62. *Bill to redeem; multifariousness.*—A bill filed to redeem lands covered by several mortgages to the same defendant, and to have cancelled a deed executed by the sheriff under an execution sale, the judgment debt being paid, and to have cancelled a deed from the mortgagee defendant to his sister, which was made without consideration, is not multifarious, since the court having jurisdiction for one purpose will, upon proper proof, settle all questions necessary to the granting of the relief prayed. *Lyon v. Dees*, 700.

2. ANSWERS; DEMURRERS; PLEAS; MOTIONS.

63. *Demurrers to the bill; rulings thereon.*—While a demurrer to a bill in equity must set forth the grounds of demurrer specifically, if the decree of the chancellor is general, not stating the particular causes of demurrer, it will be referred to such grounds as were well taken. *Baker v. Graves*, 247.
64. *Statute of frauds; waiver as a defense to a bill for specific performance.*—The statute of frauds, as a defense to a bill for the specific performance of a contract, is waived unless specially pleaded; and the contract being admitted or satisfactorily proved, it will be enforced although it may be obnoxious to the statute. *Whisenant v. Gordon*, 250.
65. *Insufficient demurrer.*—Although in such a bill, an averment that the "complainant does not know whether the notes were ever executed or not" is insufficient to excuse a more specific averment of the terms of a contract, in that it does not show that complainant had done what he ought to have done to inform himself in the premises, a demurrer on the ground that "the bill fails to describe the notes alleged to have been executed for the purchase money, or to show when same was

CHANCERY—*Continued.*

- due," is not sufficient to raise this objection. *Ashurst v. Peck*, 499.
66. *Bill in equity to specifically enforce a contract; stale demand.*—A demurrer to a bill, filed by one claiming under the vendee in a contract of purchase to enforce the specific performance of said contract, on the ground that the "alleged right of complainant is stale," is based on the ground that a demand or claim by the complainant has not been asserted for so long a time that the court is without equity to enforce it; and does not raise, as an objection to the maintenance of the bill, that the complainant has so acquiesced in the assertion by the vendor and his personal representative of possession of the land, and a retention by them of the rents and profits, that a court of equity, in the discretionary exercise of its jurisdiction to enforce an executory contract, will not lend its aid to the enforcement of the contract involved in such suit. *Ib.* 499.
67. *Demurrer to an entire bill.*—A demurrer to a bill in equity as a whole can not be sustained, if, for any equity apparent in the bill, the complainants are entitled to relief. *George v. Central R. R. & Banking Co.*, 607.

3. HEARING AND DECREES.

68. *Fraudulent conveyances; evidence on bill filed to set them aside.*—Where an insolvent debtor conveys lands to some of his creditors by a deed absolute in form, in alleged payment of a debt greatly less than the value of the lands, and the creditors subsequently convey the same lands to the wife of the debtor upon a recited cash consideration, greatly less than the value of the lands, and at the time of the latter conveyance the said creditors accounted to the debtor for the rents collected and taxes paid by them pending their possession, and offers to purchase said lands were referred to the debtor, who continuously claimed the ownership thereof, the deed to the creditors will be construed a mortgage, and upon a bill filed by other creditors of the said debtor for that purpose, both of the conveyances will be set aside as fraudulent and void. *Moog v. Barrow*, 209.
69. *Same; variance between proof and allegations.*—When, in a bill filed to set aside as fraudulent a conveyance from an insolvent debtor to certain creditors and a conveyance from the said creditors to the wife of the debtor, the bill averred that the debtor owned the lands in fee, and the proof showed that it was owned jointly by the said debtor and one who was not a party to the suit, there is no variance between the allegations and proof, so far as the parties to the suit are concerned, since the wife did not claim title from the joint owners of the land, but derived her title from her husband's grantees. *Ib.* 209.
70. *Specific performance; what necessary to justify decree.*—To justify a decree for the specific performance of a contract of sale or conveyance of land, the terms of the contract must be definitely alleged, and the evidence to establish it must be such as to produce a clear conviction of the existence and terms of the contract as alleged. *Whisenant v. Gordon*, 250.
71. *Decree before cause at issue erroneous.*—When, to a bill filed by the assignee of an insolvent debtor, which avers the levy of an attachment by the debtor's lessor and admits the justness of a claim for rent thus asserted, there have been no answers filed, and no decrees *pro confesso* have been rendered against the defendants not answering, the cause is not at issue; and an order of reference to ascertain the amount due the attaching lessor,

CHANCERY—Continued.

- and a decree that the amount so ascertained be paid is erroneous when rendered before the cause was at issue, and before the creditors of the assignor had an opportunity of presenting and proving their claims. *Louisville Mfg. Co. v. Brown*, 273.
72. *Decree to support an appeal*.—A decree that settles matters of contention and the material equities in a cause will support an appeal. *Ib.* 273.
73. *Same*.—An appeal lies from a decree in a suit by an assignee named in the deed of assignment for the execution of the trust, in which the debt is ascertained and ordered to be paid out of the proceeds of the assets, without giving creditors an opportunity to contest such debt, or to present and prove their claims. *Ib.* 273.
74. *When separate decrees in favor of several complainants erroneous*.—When one of two complainants in a bill seeking the specific performance of a contract derives his interest in the contract from the indorsement thereon by his co-complainant, it is error to render two separate decrees against the defendants, one in favor of each complainant; there should be but one joint decree in favor of complainants. *Eastman v. Reid*, 320.
75. *Alleged fraudulent transfer of stock; when moneyed decree against transferee erroneous*.—In a bill seeking the specific performance of a contract for the transfer of stock in a corporation to complainants, where it is alleged that the contractor had transferred all of his stock in said corporation to his wife without consideration, and to defraud complainants, but there is no averment showing that the wife had any knowledge of, or connection with the alleged fraudulent design, it is error to render a moneyed decree against the wife, although she was a party defendant to the said bill. *Ib.* 320.
76. *Dissolution of injunction*.—When an answer to a bill seeking an injunction specifically denies the principal allegations of the bill, upon which rests the right of the relief asked, the temporary injunction is properly dissolved. *Elliott v. Sibley, et al.* 344.
77. *Same; when decree of foreclosure erroneous*.—When, on a bill filed to have a mortgage executed on March 1, 1887, to a foreign corporation declared void and cancelled, as violative of section 4, Article XIV of the constitution and the act approved February 8, 1887, to give force and effect to this constitutional provision, there is no sufficient offer by complainant to do equity, or to submit himself to the authority and jurisdiction of the court, and the proof shows that the defendant has complied with the requirements of the said constitutional and statutory provisions, at the time of making the loan and taking the mortgage to secure it, a decree of foreclosure should not be rendered, but the bill, being without equity, should be dismissed. *Ross v. N. E. Mortg. Sec. Co.*, 362.
78. *What is a final decree*.—A decree in chancery, which settles all the equities between the parties, leaving only matters of account to be adjusted on a reference before the master, is such a final decree as will support an appeal. *Foley v. Leva*, 395.
79. *Limitation of appeal; when assignments of error are stricken out*.—Where an appeal is sued out in a chancery cause more than a year after the rendition of a decree which settled all the equities between the parties, such decree can not be reviewed, and all the assignments of error relating to matters embraced in that decree should be stricken out, upon motion, because the appeal was barred at the time it was taken. *Ib.* 395.
80. *Bill in equity to have a lien declared; what is a final decree*.—Where, in a bill filed by heirs to have a lien declared in their

CHANCERY—*Continued.*

favor upon a certain lot alleged to have been purchased and improved by the administratrix of their decedent's estate, partly with the funds of the estate, which lot had been mortgaged by her to her co-defendants, it is shown that a part of the debt secured by said mortgage was an individual debt of the administratrix secured by a prior mortgage given by her on said lot, and which was assumed by her co-defendants, a decree holding the mortgage by the administratrix to her co-defendants to be a superior lien on the lot, to the extent of the debt assumed by the mortgagees, and that as against the remainder of the debt secured by said mortgage complainants were entitled to relief, at the same time giving particular instructions and directions to the register as to the manner of taking and stating an account between the parties, settles all the equities of the bill as between the complainants and the defendants, and is a final decree, from which an appeal may be prosecuted. *Ib.* 395.

81. *Bill to enforce trust; when evidence insufficient to authorize relief.*—In a bill filed to establish a trust in land, the complainants claimed that they purchased the lands under a parol agreement; that defendant loaned them money to make the cash payment, and became security for deferred payments; that title was taken in defendant's name to secure him, he agreeing to convey the lands to complainants on re-payment by them of his loan, and the balance of the purchase price. The only evidence to establish these facts was the testimony of one of the complainants, and of persons who derived their information from him. The testimony of the defendant, of the vendor, and of the person who took the acknowledgment sustained the claim of defendant, that he made the purchase for himself, that he made the cash payment and paid at maturity his note executed for the deferred payment; and that he verbally promised to sell the land to the complainants, who had been unable to purchase it; and that complainants knew of the sale of part of the land by the defendant, and witnessed valuable improvements thereon, but raised no objection or claim. *Held*, that the complainants were not entitled to the relief prayed, and that the bill was properly dismissed. *Jordan v. Garner*, 411.
82. *Accounting and settlement of a partnership; when a reference is properly decreed.*—A bill was filed for an accounting between partners, and a settlement of the partnership after dissolution. The averments of the bill were not as definite as good pleading required, and no objection was made to the bill on this account; but respondent, in his answer, alleged that the partnership matters were so conducted that it was impossible to state an account approximately correct. The only evidence on this question was the testimony of the parties themselves, which, in some respects was irreconcilable. *Held*, that a decree ordering a reference was not erroneous, since upon such reference other evidence might be introduced, and a decree of confirmation would not be refused if the evidence taken upon the reference clearly shows a balance in favor of one partner; although it was impossible to make an absolutely correct statement of the account. *Costello v. Montague*, 426.
83. *Decree upon demurrers; when insufficient to authorize appeal therefrom.*—An entry, "submitted for decree upon demurrers to the bill and demurrers sustained," is not a decree sustaining the demurrers to a bill from which an appeal may be taken as provided by statute, (Code, § 3612); and when this is the only entry shown in the transcript of the docket entries of the chancellor, the appeal will be dismissed. *Mann v. Hyams*, 431.

CHARGES OF COURT TO JURY.

1. *Charges as to duties of engineer.*—In an action against a railroad company by an employé to recover damages for personal injuries, it was shown that the plaintiff was the engineer on a switch engine; that under the orders of the assistant yard master, who was his superior, he was moving a train from the main track; that by reason of the switch being left open by a brakeman on another train of the defendant, plaintiff's engine left the main track, and collided with another train on a side track. The plaintiff testified that before reaching the switch he saw the safety signal, that he was running between five and six miles an hour; that when he noticed that the switch was open, and a collision with the train standing on the side track was inevitable, by reason of the switch being improperly turned, he reversed his engine, sanded the track, and did all he could to avert the collision. The brakeman, who left the switch open, testified on behalf the defendant that when he first saw the plaintiff's engine, after placing the switch, it was only a car length therefrom, that he at once signalled the plaintiff, and started to throw the switch, but did not have time to do so, the plaintiff's engine being run at between sixteen and seventeen miles an hour. *Held*, that a charge that "if the plaintiff kept the best lookout for switches and obstructions on the track he could, consistent with his other duties to watch the signals and manage the engine, if such other duties were of equal importance, this would not be negligence," though incomplete, is easily understood, when considered in connection with the evidence, is not calculated to mislead, and the giving of it is not error. *L. & N. R. R. Co. v. Hurt*, 34.
2. *Charge as to plaintiff's negligence.*—A charge which instructs the jury that, although the plaintiff was guilty of negligence, "if the jury believe from the evidence that this negligence did not contribute to plaintiff's injury," it will not prevent his recovery, asserts a correct proposition, and is properly given. *Ib.* 34.
3. *Charge as to evidence of brakeman not setting switch.*—A charge, that if the brakeman of defendant who left the switch open, by reason of which the collision occurred resulting in the plaintiff's injury, "knew of plaintiff's peril in time to have prevented the plaintiff's injury, and could have prevented it by using all the means at his command, but negligently failed to apply the means, and if the injury resulted to plaintiff by reason of such failure, this would amount to reckless or wanton conduct, and would entitle the plaintiff to recover, whether the plaintiff was negligent or not, provided plaintiff did all he could to prevent the injury and to save himself from harm, after he became aware of his peril," asserts a correct proposition of law, and is properly given. *Ib.* 34.
4. *Inconsistency in charges given by the court.*—If, at the request of one of the parties to a suit, the court gives a charge which is inconsistent with the general oral charge to the jury, and which is erroneous, the party in whose favor the charge is given can not take advantage of the error to the prejudice of the other party to the suit. *Ib.* 34.
5. *General exception to the oral charge of the court.*—A general exception to the whole of the court's oral charge to the jury is not well taken, if any portion of the oral charge, so excepted to, announces correct propositions of law. *Ib.* 34.
6. *Charge on a portion of the evidence.*—A charge which singles out any particular part of the evidence and bases a conclusion of law upon it, gives undue prominence to this portion of the evidence, is calculated to mislead the jury, and is properly refused. *Ib.* 34; *Wadsworth v. Williams*, 264.

CHARGES OF COURT TO JURY—Continued.

7. *Charges ignoring any tendency of the evidence properly refused.*—If in an action to recover damages for personal injuries, there is evidence which tends to show that plaintiff failed to exercise proper preventive effort, after his peril was discovered, a charge which ignores this tendency of the evidence is properly refused. *Ib.* 34.
8. *Refusal of charges which are mere repetition of former charges.*—A court commits no error in refusing charges requested by parties to a suit which are mere repetitions of charges already given by the court; and a mere variation in the use of words, which in no way change the meaning or assert different principles from those already given, do not compel the giving of such charges. *Ib.* 34.
9. *Misleading charges.*—Charges which instruct the jury that a contradiction of a witness by himself constitutes an impeachment, and which ignores an explanation by the witness of such contradiction, tend to mislead the jury and are properly refused. *Ib.* 34.
10. *Charges invasive of the province of the jury.*—In an action of trover for the conversion of timber wrongfully cut from leased premises, a charge instructing the jury that if they believe from the evidence that the defendant cut down the trees and converted them under the belief that he had the right to do so under the lease, they "should fix the value of the wood at the place it was cut, after deducting the cost of cutting the same, and after deducting the cost of hauling the same," is properly refused as being invasive of the province of the jury. *Brooks v. Rogers*, 111.
11. *Charge making ignorance of law an excuse for its violation properly refused.*—In an action against a railroad for the alleged negligent killing of plaintiff's intestate by a collision between the defendant's train and an engine on the dummy line upon which the intestate was the engineer, a charge which asserts that, "if the jury find for the plaintiff, in assessing the damages as a punishment to the defendant, they might look to the fact that at the time of the alleged injury, the law was in some doubt as to whether a dummy railroad was a railroad within the meaning of the statute, requiring the stoppage of trains within 100 feet of the crossing of a railroad," is properly refused; the charge making the defendant's employes' alleged ignorance of the law an excuse for its violation. *Birmingham Min. R. R. Co. v. Jacobs*, 149.
12. *Charges to the jury.*—In an action to recover damages against a railroad, where the plaintiff counts upon the alleged negligence of the defendant's "engineer, conductor, servants or agents," in charge of the train, an instruction that the jury "can not find from the evidence that the engineer in charge of the engine propelling defendant's freight train was guilty of negligence," is properly refused, since, if the engineer was not negligent, other employes on the defendant's train, upon whom rested duties, might have been negligent, and because the question of negligence was one for the jury. *Ib.* 149.
13. *Misleading charges.*—In an action against a railroad for injuries resulting from a collision of one of defendant's freight trains with a passenger train on a dummy line, at their point of intersection, a charge to the jury, "that the engineer in charge of the engine propelling the passenger train, should exercise more care than the engineer in charge of the engine propelling the freight train," is properly refused, as being calculated to mislead the jury, and as asserting a principle, which if ever true, had no application to the case at bar. *Ib.* 149.

CHARGES OF COURT TO JURY—*Continued.*

14. *Charges properly refused when disregarding positive statutory requirements.*—In an action against a railroad to recover damages, caused by a collision at the intersection of defendant's road with a dummy line, an instruction that if "at the time defendant's said servants failed to stop said train they did not know, and had no good reason to believe, that the dummy train was about to cross defendant's track, then the failure to make such a stop would not be negligence on the part of the defendant's employés," is properly refused, since it ignores the positive requirements of the statute. *Ib.* 149.
15. *Charge to the jury; properly refused when misleading.*—In an action against a railroad company to recover damages for the alleged negligence of "its engineer, conductor, servants and agents," in charge of one of its trains, an instruction to the jury, that "the only negligence for which the plaintiff can recover under the evidence in this case is the negligence of the conductor in not stopping defendant's train before reaching the crossing," is properly refused, as being calculated to mislead the jury, and as taking from them the consideration of the negligence of defendant's other employés. *Ib.* 149.
16. *Charge as to the assessment of damages; when erroneous.*—In an action for malicious prosecution, an instruction to the jury that, if the prosecution was instituted maliciously and without probable cause, the jury might find for the plaintiff, and assess damages in such an amount as they determined the plaintiff was entitled to, without direction as to the elements of damages or the principles by which the jury's discretion should be governed, is erroneous and should not be given. *Marks & Co. v. Hastings*, 165.
17. *General affirmative charge.*—In an action for malicious prosecution against two defendants, where the evidence is conflicting as to the liability against one of them, the general affirmative charge for the defendants is properly refused, although a similar charge, applicable to the other defendant, might have been correct. *Ib.* 165.
8. *Charge to the jury; right of defendant to dismiss prosecution.*—In an action for malicious prosecution, where the evidence shows that the defendant refused to withdraw the prosecution, a charge to the jury that defendant had no authority to dismiss the prosecution is abstract and erroneous, since the prosecutor could have dismissed the prosecution by permission of the court. *Ib.* 165.
19. *Charge as to fraudulent conveyance.*—In a statutory claim suit, where the sale to the claimant is attacked as fraudulent, a charge which instructs the jury that they must find a verdict for the claimant, if the evidence in the cause shows an honest intent on the part of the claimant (grantee) to secure the payment of a *bona fide* indebtedness, and that there was no reservation of benefit to the debtors in the purchase of said goods from them, and that the claimant received no more goods than was sufficient to pay his debts, asserts a correct proposition at law, and is properly given. *Claflin & Co. v. Rodenberg*, 213.
20. *Argumentative charges.*—Argumentative charges should be refused; but the giving of such charges is not reversible error. *A. G. S. R. R. Co. v. Dobbs*, 219.
21. *Charges to the jury.*—In an action by a parent against a railroad company for killing his child, if based on the tendency of the evidence adduced, it is a proper instruction to the jury to charge them that, "If the engineer did all in his power to avert the accident, but any one of the brakemen was negligent in the discharge of his duties, then the negligence of such brakeman

CHARGES OF COURT TO JURY—*Continued.*

- is by law attributed to defendant; and if the jury further find that such negligence proximately caused the injury complained of, then the jury should find a verdict for plaintiff, unless they further find that the plaintiff has been guilty of contributory negligence." *Ib.* 219.
22. *General affirmative charge.*—General affirmative charges should never be given when there is conflict in the evidence. *Ib.* 219.
23. *Charge defining negligence.*—In an action against a railroad company for alleged negligent killing of plaintiff's child, a charge that defines negligence as consisting "either in doing what a man of ordinary intelligence, care and prudence ought not to do, or in omitting to do what a man of ordinary intelligence, care and prudence ought to have done," and then instructs the jury that "if the plaintiff was guilty of either of these kinds of negligence and thereby contributed proximately to produce the injuries" complained of, the jury ought to find a verdict for the defendant, is erroneous in ignoring the consideration of willful, wanton or intentional negligence on the part of defendant's employes, and is properly refused. *Ib.* 219.
24. *Charge as to contributory negligence.*—In an action against a railroad company to recover damages for personal injuries, it is proper to refuse a charge which instructs the jury that, "If the plaintiff by ordinary care could and would have avoided the injury of which he complains of, and if by his failure to exercise such ordinary care he contributed proximately to produce the injury of which he here complains, then, upon this state of facts, the jury ought to find a verdict for the defendant, although they may believe all the evidence as to any alleged negligence of the conductor, engineer or brakeman." Such charge ignores the consideration of any willful, wanton or intentional negligence by the defendant. *Ib.* 219.
25. *Charge as to duty of plaintiff, in an action against a railroad.*—In an action against a railroad company, for the alleged negligent killing of plaintiff's child, the court properly refused a charge which instructed the jury that the law required the plaintiff to observe such prudent care in protecting his child and keeping it from going into dangerous places, as a reasonably prudent man would observe under like circumstances, and if the plaintiff did not observe such care, and "such omissions of care contributed in the slightest degree to the injury of the child, then, in such case, the verdict of the jury must be for the defendant, although the defendant may have been guilty of simple negligence." Such instruction ignores the consideration of willful, wanton or intentional negligence, and makes the slightest degree of negligence on the part of the plaintiff the equivalent of contributory negligence. *Ib.* 219.
26. *Same.*—In such an action a charge is properly refused that instructs the jury that, if the evidence of the plaintiff raises a presumption that he was guilty of such acts of negligence in the care of his child as contributed in any degree to its injuries, "then, the burden of proof is upon the plaintiff to show he was not guilty of such negligence as contributed in the slightest degree to the injury of the child, and if the jury are reasonably satisfied the plaintiff has not done this, then the verdict must be for the defendant, although the jury may believe the defendant was guilty of simple negligence." Such charge not only ignores the consideration of any willful, wanton or intentional negligence, but erroneously defines contributory negligence. *Ib.* 219.
27. *Abstract charges.*—Charges that are abstract should be refused,

CHARGES OF COURT TO JURY—*Continued.*

- although they contain correct propositions of law. *Wadsworth v. Williams*, 264.
28. *Charge to the jury*.—Where, in an action against the buyer for the breach of a contract of sale of coke at a certain price per ton, "f. o. b. cars, Sheffield, Alabama," there is evidence tending to show that after making the contract the buyer agreed to pay freight on shipments as received, and thereafter paid freight for a considerable period for all coke which was delivered to it, without objection, a charge instructing the jury that "according to the written contract between the parties, the Hull Coal & Coke Company [the seller] was bound to pay the freight on the coke to Sheffield, and the defendant was not bound to pay the freight, and if the defendant, at the instance and request of the plaintiff voluntarily paid the freight up to the 1st of July, 1888, [the time of the last shipment] this did not bind them to pay the freight afterwards, nor exempt the plaintiff from the obligation to pay freight," is free from error, and should be given; the question as to whether the original contract, in respect to the payment of freight, was changed by a subsequent binding agreement between the parties, being a question for the determination by the jury from the evidence. *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 446.
29. *Charge to the jury*.—When, in a suit upon a promissory note, there is no issue of set-off presented by the pleadings, a charge which authorizes the jury to return a verdict in excess of payment over the debt claimed by the plaintiff, as they may determine from the evidence, is erroneous, and should not be given. *Knight v. Bradley*, 517.
30. *Action to recover statutory penalty for cutting trees; misleading charge*.—In an action to recover the statutory penalty for knowingly and willfully cutting and removing trees from the lands of another without his consent (Code, § 3296), an instruction that defendant is liable for what the trees were worth, though he did not know, at the time the trees were cut, that they were on plaintiff's lands, is properly refused, it being confusing and calculated to mislead the jury, in that the jury might understand therefrom that the defendant was liable in no event for anything more than the value of the wood cut from the land. *Morris v. West et al.*, 534.
31. *Abstract charges; not reversible error to give them*.—There is no reversible error in giving charges which assert correct propositions of law, but which, in the particular case given, may be abstract. *Lewis v. Simon & Co.*, 536.
32. *Charge to jury*.—When issue is joined on a plea of the failure of consideration, and the defendant testifies that the note and mortgage, which formed the basis of the claim to the property sued for, were executed upon a promise by the plaintiff's agent that they would lend defendant a certain sum, that plaintiffs had refused to make the loan, and that defendant had received nothing in consideration of the note and mortgage, it is error to refuse a charge asked by the defendant which asserts, "If the promise was in fact made by plaintiffs, through their agent, to let defendant have five hundred dollars in money on the mortgage and note, then plaintiffs can not recover." *Ib.*, 546.
33. *Action under sub-section 2 of section 2590 of the Code; erroneous charge to the jury*.—In an action against a municipal corporation by one of its employes, under sub-section 2 of section 590 of the Code, to recover damages for personal injuries, alleged to have been caused by the negligence of the agent or employé of the defendant intrusted with the superintendence of the work at

CHARGES OF COURT TO JURY—*Continued.*

which the plaintiff was engaged, while in the exercise of such superintendence, in allowing a dynamite cartridge to be left at the place where the plaintiff was required to work, it is error to instruct the jury that, "If the dynamite causing the plaintiff's injury was carelessly and negligently left buried by the defendant, or its servants or agents in the discharge of their duty, before the plaintiff was employed by the defendant, and the plaintiff could not by the use of ordinary care and diligence, or precaution, have discovered the danger, then, I charge you, that the defendant is liable in this action, and your verdict should be for the plaintiff for such amount as you believe from the evidence he was damaged, not exceeding \$8,000"—the amount sued for. *City Council of Sheffield v. Harris*, 564.

34. *Charge to jury; joint and several trespass.*—In an action of trespass against two defendants for a joint and several wrong, a charge to the jury that instructs them that "whatever judgment they rendered, if against the defendant, must be a joint judgment against both defendants," is properly refused, as being misleading and invasive of the province of the jury. *Milner et al. v. Milner*, 599.
35. *Abstract charge.*—The giving of a charge that is merely abstract does not, as a general rule, work a reversal of the judgment; but where it is manifest to the appellate court that the giving of such abstract charge misled the jury to the prejudice of the party cast in the suit, the judgment consequent thereupon will be reversed. *Goldsmith & Davis v. McCafferty*, 663.
36. *Instructions not based on evidence.*—When, in an action on a promissory note given for the purchase price of a bale of Havana tobacco, which was bought at the same time with a case of leaf tobacco, a separate note being given for the latter, the defendant's evidence showed that the leaf tobacco, represented to be "natural sweat leaf," was in fact re-sweated, and not worth more than twenty cents instead of thirty cents per pound, the price given, and that he agreed, however, to accept it, if plaintiffs would extend the time of his note for such leaf tobacco, which was done, but there was no evidence that the defendant asked for an extension of time of the payment of the note for the Havana tobacco, which was the note sued on, and had made no claim that said Havana tobacco was not as represented, it is a reversible error to instruct the jury that "Even though the jury may believe the defendant asked for and obtained an extension of time of the indebtedness sued on, this does not prevent him setting up a failure of consideration in the debt sued on, if the defendant was not aware, at the time of the giving of the note, that the tobacco was resweated, and it was in fact re-sweated;" such charge being not only abstract, but also misleading. *Ib.* 664.
37. *Charge on defendant's evidence.*—In such a case a charge that the jury must find for defendant, if they believed the defendants' evidence is properly refused, since it confines the jury to the consideration of only a part of the testimony, when they should, in making up their verdict, consider all the evidence together. *L. & N. R. R. Co. v. Rice*, 676.
38. *Charge to jury.*—The court properly charged the jury that, "To prove that the engineer was on the lookout at the time when he actually discovered the cattle, is not enough to show that he fully performed his duty. If he failed to discover the cattle sooner, when he might have done so, if he had kept a proper lookout prior to the actual discovery of the cattle, then the defendant is chargeable with negligence." *Ib.* 676.
39. *Same.*—A charge is properly refused, which instructs the jury

CHARGES OF COURT TO JURY—*Continued.*

that if the engineer saw the cattle a quarter of a mile before reaching them, when they were standing near, and indicating no intention of moving to the track, and would not probably have been injured where they were, he was under no further duty to lookout for their safety. *Ib.* 676.

40. *Same.*—A charge that requires the plaintiff to prove negligence on the part of the defendant, committed prior to the time the cattle got upon the track, is properly refused, since, if the injury resulted from the negligence of defendant's employes, committed subsequently to the time the cattle got upon the track, the defendant is liable, although there may have been no negligence prior to that time. *Ib.* 676.

CLERK OF COURT.

1. *Clerk's fees for summoning defendant's witnesses; not payable out of the fine and forfeiture fund.*—The fees of the clerk of a court for issuing subpoenas for witnesses in a criminal case at the request of a defendant, who was acquitted, can not be paid out of the fine and forfeiture fund of the county; such services of the clerk being rendered for defendant creates a debt against him, and must be paid by him. *Burgin v. Hawkins, Treasurer, 326.*

CODE OF ALABAMA.

- § 43². Contest of elections.—*Turnipseed v. Jones, 593.*
 §§1553-1556. Building & Loan Associations.—*Southern Bldg. & Loan Assn. v. Anniston Loan & Trust Co., 582.*
 §1586. Lease of railroad by another railroad company.—*George v. Central R. R. & Bkg. Co., 607.*
 §1662. Subscription for corporate stock.—*Davis v. Montgomery F. & C. Co., 127.*
 § 674. Lien of corporation on its stock.—*Birmingham Trust & Sav. Co. v. East Lake Land Co., 304; Elliott v. Sibley, 344.*
 §§1683-1686. Receiver of dissolved corporation.—*Florence Gas, Elec. Light & Power Co. v. Hanby, 15.*
 §1730. Conveyance of personalty in trust.—*O'Neil v. Birmingham Brew. Co., 383.*
 §1732. Statute of frauds.—*Webb v. Hawkins Lumber Co., 630.*
 §1737. When mortgage declared general assignment.—*Anniston Carriage Works v. Ward, 670.*
 §1984. Certified transcript of probated will as evidence.—*Newsom v. Holesapple, 682.*
 §208. Statute of non-claim; presentation of claims.—*Page v. Bartlett, 193.*
 §§2104, 2106. Sale of lands to pay decedent's debts.—*Kent v. Mansel, 334.*
 §2111. Proof of insufficiency of personalty to pay decedent's debts.—*Kent v. Mansel, 334.*
 §2283. Appointment of administrator *ad litem*.—*Page v. Bartlett, 193.*
 §§2341-2356. Wife's separate estate.—*Strouse v. Leipf, 433.*
 §2345. Husband's liability for torts of wife.—*Strouse v. Leipf, 433.*
 §2589. Action for negligence causing death.—*Dantzler v. DeBardeleben Coal & Iron Co., 309.*
 §2590. Employer's liability for negligence.—*Dantzler v. DeBardeleben Coal & Iron Co., 309; Birmingham R. & E. Co. v. Baylor, 488; City Council of Sheffield v. Harris, 564.*
 §2631. Commencement of suit.—*West v. Engel, 509.*
 §2720. Detinue by mortgagee against mortgagor.—*Lewis v. Simon & Co., 546.*
 §2756. Charges asked, how marked.—*A. G. S. R. R. Co. v. Dobbs, 219.*

CODE OF ALABAMA—*Continued.*

2801. Personal attendance of a woman as a witness.—*Ex parte Jenks*, 429.
 §2813. Deposition of woman.—*Ex parte Jenks*, 429.
 §3069-3070. Enforcement of landlord's lien.—*Carmen & Begg v Ala. Nat. Bank*, 189.
 §3207-3220. Condemnation proceedings.—*L & N. R. R Co. v. The Peoples St. Railway & Improvement Co*, 331.
 §3237-3262. Partition of land.—*Austin v. Bean*, 133.
 §3296. Wilfully cutting trees.—*Turner Coal Co. v. Glover*, 289; *Morris v. West*, 534.
 §3612. Appeal from decree on demurrer.—*Mann v. Hyams*, 431.
 §3705. When penal statutes take effect.—*Ross v. New Eng. Mortg. Sec. Co.*, 362.

COLLATERAL ATTACK.

1. *Formation of a corporation under the general law; legal existence can not be assailed collaterally.*—For the formation of a corporation under the general law, a substantial compliance with all the terms of the general corporation law, having reference to the character of the corporation to be formed, is a prerequisite to its organization; but when an association of persons is found in the exercise and user of corporate franchises, under color of legal organization, their existence as a corporation can not be inquired into collaterally. The corporation exists *de facto*, and is subject to all the liabilities, duties and responsibilities of a corporation *de jure*. *Bibb v. Hall*, 79.
2. *Order of sale collaterally attacked; error must affirmatively appear on the face of the record.*—When a decree of the probate court ordering the sale of the decedent's lands for the payment of debts is collaterally attacked, the decree will not be annulled and set aside, unless the matters relied on as avoiding the adjudication appear affirmatively on the face of the record. *Kent v. Mansel*, 334.
3. *Decree of sale of decedent's lands; presumption in favor of the decree of the probate court on collateral attack.*—When, in an action of ejectment, a decree of the sale of decedent's lands is attacked, on the ground that the evidence in the proceedings in the probate court was not taken in the manner required by statute, (Code, § 211), the order of sale of said lands by the probate court is not set out in the record, but the statement is made that the court rendered a decree ordering said lands to be sold for the payment of the debts of said estate, this court, on appeal, will presume that the order or judgment of the probate court contained all that was necessary to uphold its validity, including the finding that proof of the necessity of the sale to pay the debts was made by disinterested witnesses, as provided by the statute, and that such order was sufficient. *Ib.* 335.
4. *Proceedings to set apart homestead; objections can not be raised on collateral attack.*—In an action of ejectment, involving the widow's title to the homestead, an objection that the record of the proceedings to set apart the homestead to the widow did not show affirmatively that the commissioners appointed were "citizens of good standing," can not be raised. *Smith v. Boutwell*, 373.

COMMISSIONERS COURT.—See COURTS, SUB-TITLE.

CONDEMNATION.—

1. *No appeal lies from a judgment of a probate court in condemnation proceedings to the supreme court.*—No appeal lies directly to the

CONDEMNATION—*Continued.*

supreme court from any proceeding, judgment, order or decree of the probate court made or entered therein in proceedings to condemn a right of way for a railroad, as provided by the statute, (Code, §§ 3207-3220.) *L. & N. R. R. Co. v. The Peoples St. Railway & Imp Co.*, 331.

CONSTITUTIONAL LAW.—

1. *Construction of constitutional provisions.*—Constitutional provisions are to be expounded in the light of conditions existing at the time of their adoption, in connection with former provisions and historical facts relating to the origin of our political institutions and the practice under them. *For v. McDonald*, 51.
2. *Distribution of powers.*—All powers which are, by the constitution itself, expressly or by necessary implication, referred to the exclusive exercise of one of the several departments of the government, must be exercised by that department, and can not be, by legislation, conferred elsewhere. *Ib.* 51.
3. *Nature of powers conferred not determinative of the department by which they are to be exercised.*—The fact that certain powers and duties conferred by legislation partake of a legislative, executive or judicial nature, is not determinative of the department of the government by which such powers and duties are to be exercised. *Ib.* 51.
4. *Same.*—The constitutional provision in regard to the distribution of the powers of government into three departments, and forbidding the exercise by an officer of one department of any act properly belonging to another, "was not intended to declare that every act pertaining to government, and the regulation of the social and property rights of the citizen, should be exercised exclusively by the legislative, executive, or judicial department, or some member of it, according as the act possessed a legislative, executive, or judicial character." *Ib.* 51.
5. *Power of appointment to office not inherently an executive function.*—The power to appoint to office is not inherently an executive function; but by the policy of our government has been distributed among the several departments of State. *Ib.* 51.
6. *Power of Governor to appoint to office.*—The Governor, as the chief executive, has no inherent right to appoint to office, and this function belongs to him only when conferred by statute. *Ib.* 51.
7. *Constitutionality of the act to establish a board of police commissioners for the city of Birmingham.*—The act approved December 1, 1892, "To establish a board of commissioners of police for the city of Birmingham, Alabama," which confers on the probate judge of Jefferson county, the county in which the city of Birmingham is situated, the power to appoint the commissioners, is not unconstitutional and void by reason of conferring upon a member of the judicial department the power of appointment. *Ib.* 51.
8. *Legislative enactments presumed to be constitutional.*—Legislative enactments are always presumed to be in accord with the constitution, and will not be declared unconstitutional and void, unless it clearly appears that they offend some provision of the constitution. *Ib.* 51.
9. *The act to establish a board of police commissioners of the city of Birmingham not unconstitutional, as denying to the city the right of local self-government.*—The act "To establish a board of commissioners of police for the city of Birmingham," which confers on the probate judge of Jefferson county the power to appoint the commissioners, but does not in express terms provide that the

CONSTITUTIONAL LAW—*Continued.*

- commissioners so appointed shall be residents of the city of Birmingham, is not unconstitutional because of such omission; the controlling purpose of the act being to provide an efficient enforcement of the police powers of Birmingham, and the intention that the commissioners to be appointed shall be residents of the said city being manifest on the face of the statute itself. (COLEMAN, J. concurring in the conclusion, but not in the reason therefor.) *Ib.* 51.
10. *Legislative enactments; when they go into operation.*—Legislative enactments and their provisions go into immediate operation, unless by force of some general law, or some provision contained in the act itself, the operation is postponed, and the special provision fixing such postponement must be in terms so clear and certain as to admit of no other rational interpretation. *Ib.* 51.
 11. *Termination of the tenure of former officers upon appointment under a new statute.*—Under the act establishing the board of police commissioners for the city of Birmingham, which provided for the appointment of commissioners by the probate judge of Jefferson county on a certain day, the tenure of the several police officers serving at the time of the passage of said act terminated so soon as the police commissioners were appointed by the probate judge; their appointment necessarily annulling the power under which the former police officers held. *Ib.* 51.
 12. *Act not unconstitutional because the title fails to express the object to determine the terms of the police officers.*—The title of a legislative enactment as "An act to establish a board of commissioners of police for the city of Birmingham, Alabama," implies the insertion in the act of all powers reasonably necessary to the efficient administration of the police department of the city by the police to be appointed, which includes the power to appoint police officers; and the fact that this power to appoint is effected by cutting off the terms of the incumbents does not render the act unconstitutional, because that object is not expressed in the title; the title of the act being sufficiently comprehensive to include this result. *Ib.* 51.
 13. *Issue of stock by corporation; when presumed to be legal.*—When it is shown that all the capital stock of a corporation has been subscribed and paid for in full, and there is no evidence as to the value of the consideration paid for said stock, it will be presumed that it was adequate, and a court can not declare the issue of such stock fictitious or violative of Article XIV, § 6 of the constitution, or of section 1662 of the Code of 1886. *Davis v. Montgomery Furnace & Ch. Co.*, 127.
 14. *Subscribers to corporate bonds; when not liable as stockholders.*—When stock, which has been subscribed, paid for and issued, upon adequate consideration, is by the holders thereof placed in the hands of a trustee to be paid over to subscribers for bonds of the corporation, when their subscriptions to such bonds are paid in full, such stock, so delivered to the trustee, may be transferred by him to the subscribers for bonds, upon payment of their subscriptions, without contravening the Constitution and statutes of the State, (Const. Art. XIV, § 6; Code, § 1662); and the failure to pay their subscriptions for the bonds, does not make such subscribers for said bonds liable upon the stock agreed to be delivered, as upon unpaid subscription for stock. *Ib.* 127.
 15. *Contracts violative of the constitution and laws.*—All contracts hostile to or violative of the State constitution and laws, or offensive to the public policy of the United States, are invalid and can not be made the basis of a recovery in any suit. *Hawcrwas v. Goodloe*, 162.

CONSTITUTIONAL LAW.—*Continued.*

16. *Contract violative of the public policy of the United States.*—A verbal contract by one who makes a homestead entry of Government land and fails to perfect the same, to purchase such lands under the act of Congress of June 15, 1880, (1 Sup. Rev. Stat. p. 358), and upon receipt of patent convey the lands to the one who furnishes the money with which to make the purchase, is violative of the policy of the general government, and can not be made the basis of equitable relief to enforce a trust in such lands in favor of the one whose money was used in paying therefor. *Mulloy v. Cook*, 178.
17. *Penal statutes; act regulating the doing of business by foreign corporations in this State.*—The act approved February 28, 1887, "to give force and effect to section 4, Article XIV of the constitution," which regulates the manner of conducting business in this State by foreign corporations, which prescribes the penalties for the violation of the fundamental law in reference thereto, and which provides means for the enforcing and collecting such penalties, is a penal statute under the law (Code, § 3705), and did not go into effect until thirty days after the adjournment of the General Assembly at which it was passed; the act itself not specifically providing for an earlier date for it to take effect. *Ross v. New Eng. Mortg. Sec. Co.*, 362.
18. *Mortgage to foreign corporations; when not controlled by act approved February 28, 1887.*—The act approved February 28, 1887, "to give force and effect to section 4, Article XIV of the constitution," is a penal law, and a mortgage executed by a resident of this State to a foreign corporation on March 1, 1887, being executed within thirty days after the adjournment of the General Assembly, at which said act was passed, is not governed by its provisions, and not being violative of any other statute, is a valid and binding contract between the parties. *Ib.* 362.
19. *Constitutionality of statute regulating descents and succession to property.*—The act approved February 12, 1885, (Sess. Acts 1884-85, p. 114), which provides for the setting apart of the homestead exemption to the widow, and defines her estate therein, is constitutional, since "each State has the right to enact laws for the regulation of descents and succession to property within its limits." *Smith et al v. Boutwell et al*, 373.
20. *Liability of municipality for damages for changing grade of streets.*—Under the constitutional provisions now of force, (Const. Art. XIV, § 7), a municipal corporation is liable in damages for injuries caused to property abutting on the street, by so changing the grade of said street as to prevent the natural flow of the water from said adjacent property. (*City Council v. Townsend*, 80 Ala. 489, s. c. 84 Ala. 472, overruled to this extent.) *Town of Arundale v. McFarland et al*, 381.
21. *Unconstitutionality of act extending operation of former act.*—The act approved February 9, 1893, entitled "An act to declare inoperative an act entitled 'An act to change the boundary line between the counties of Talladega and Clay in this State,' approved January 10, 1877, and to provide for the location of the line between said counties," is violative of so much of section 2, Article IV of the constitution as provides that no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only. *Miller, Judge &c. v. Berry*, 531.
22. *Title and subject matter of statutes under constitutional provisions.*—The act approved February 1, 1893, entitled "An act to provide for and regulate the pay of State witnesses in Tuscaloosa county," (Acts 1892-3, pp. 934-936), is violative of the constitutional provision that "each law shall contain but one subject which shall be clearly expressed in its title," (Const. Art. IV,

CONSTITUTIONAL LAW—*Continued.*

- § 2), because the said act not only undertakes to provide for and regulate the payment of State witnesses, but also the payment of officers' costs accruing in behalf of the State, which latter provision was to a subject matter not expressed in the caption of the act. *Yerby v. Cochrane*, 541.
23. *Same; when whole act declared void.*—Since the provisions of said act in relation to the payment of officers' costs (the subject not expressed in the title) can not be separated from the provisions in reference to the payment of State witnesses, so that the former may be stricken from the act and leave the statute complete within itself, capable of being executed, and wholly independent of those provisions which are rejected, the whole act is void. *Ib.* 541.
24. *Same.*—When a statute contains two subject matters, only one of which is clearly expressed in the title, and the provisions in reference to these separate subjects are not separable, so that the provisions in reference to the subject which is not expressed in the title can not be stricken out and leave the act to operate according to its terms and the clear intent of the legislature, the whole of the act is unconstitutional and void. *Ib.* 541.

CONTEST OF ELECTIONS—

1. *When probate judge incompetent to hear an election contest*—Where a contest of the election of a tax collector is instituted before a probate judge, who was declared elected at the same time as was the contestee, and whose election was being contested before the judge of the circuit court upon the same grounds specified in the statement of contest filed by the contestant, such probate judge, although not disqualified under constitutional and statutory provisions, has, under the doctrine of the common law, such personal interest in the questions involved as to render him incompetent to hear and determine the contest, and to justify him in declining to do so. *Medlin v. Taylor*, 239.
2. *When rulings by judge of probate in election contest not reviewed on appeal.*—Under the statutory provision, that "In contested election cases tried by the judge of probate, an appeal lies to the circuit court, to be tried *de novo*," (Code, § 43:), rulings made by the judge of probate in contest proceedings instituted before him, even though erroneous, which were not carried into the rulings of the circuit court on appeal from the probate court, will not be reviewed by the supreme court. *Turnipspeed v. Jones*, 593.
3. *When remedial statute goes into operation.*—A statute to provide for and regulate contests of elections, being remedial in its character, and not prescribing punishments or penalties, becomes operative and is of force during the entire day on which it was approved; the law in reference thereto not regarding a fraction of a day. *Ib.* 593.
4. *When statute repealed by later statute.*—When a statute to provide for and regulate contests of elections expressed the intention and attempt to repeal, by numbers, every section of the Code providing for and regulating contests of elections, and is not a re-enactment of the sections attempted to be repealed, but is the enactment of a new statute, with substantially different provisions, the said sections of the Code are repealed and destroyed by the later statute. *Ib.* 593.
5. *Effect of repealing statute upon pending contest.*—The repeal of a statute upon the very day judgment is rendered in a proceeding commenced under its provisions puts an end to such suit. *Ib.* 593.

CONTEST OF ELECTIONS—*Continued.*

- 6 *Same.*—Where, on the very day a judgment is rendered in a contest of election proceedings, instituted under the several sections of the Code providing therefor, the Governor approved an act to provide for and regulate contests of elections, which repealed the sections of the Code under which the contest was instituted, the case falls within the influence of the later statute, and the repeal of the statutory provisions under which the proceedings were commenced puts an end to the contest. *Ib.* 593.

CONTRACTS—

1. "*As soon as possible*" in a contract means *within a reasonable time.* The stipulation in a contract for the completion of work "*as soon as possible,*" requires the work to be completed within a reasonable time, or within such time as is reasonably necessary, under the circumstances, to do what the contract required to be done. *Florence Gas & El. Light Power Co. v. Hanby, 15.*
2. *Waiver of right to rescind a contract.*—The right to rescind a contract for unreasonable delay in the completion of the work agreed to be done is waived and lost by the acceptance of the work done in its incomplete condition, and the devoting of the same to the objects for which it was built. *Ib.* 15
3. *Specific performance of a contract; when not enforceable.*—When, on a bill filed by the receiver of a dissolved corporation, seeking the specific performance of a contract made between such corporation and another company, it is shown that in the contract the corporation, of which the complainant is the receiver, agreed to construct an electric light plant for the defendant corporation, and to pay off debts due from the defendant corporation, some of which were secured by a mortgage, and that the defendant agreed to issue first mortgage bonds to the construction company, to secure the debt arising from the performance of the work stipulated, with leave to take the bonds in absolute payment after a certain time, a specific performance of such a contract can not be decreed, when the bill contains no averment that the debts due from the defendant to third parties, which were agreed to be paid by the construction company, had been paid, nor an averment of an offer, or even a readiness or willingness to pay such debts; the failure of the construction company to perform its part of the contract by paying the debts, making a specific performance of the contract by the defendant, by the delivery of first mortgage bonds, impossible. *Ib.* 15.
4. *Partial performance of work, and acceptance thereof; sufficient for establishment of mechanic's and material-man's lien.*—Although a contract, as originally made, was not severable, and there could have been no recovery for work done under it, except upon full performance of the contract, still, if there has been a part performance of the contract, and the owner has accepted it in its approximately completed condition, and is using it for the objects for which it was built, the law implies a promise on his part to pay what the work done is reasonably worth, and the contractor is entitled to enforce this debt by a mechanic's and material man's lien. *Ib.* 15.
5. *When right to a mechanic's and material-man's lien not affected by act of February 12, 1891.*—When a contract is entered into, and the work and materials for which a lien is sought to be enforced were done and supplied, and a bill to enforce such lien is filed, prior to the passage of the act of February 12, 1891, (Acts 1890-91, p. 578), providing for mechanic's and material-

CONTRACTS—Continued.

- man's lien, the right to the enforcement of such lien is not affected by said act. *Ib.* 15.
6. *Contracts violative of the constitution and laws.*—All contracts hostile to or violative of the state constitution and laws, or offensive to the public policy of the United States, are invalid and can not be made the basis of a recovery in any suit. *Hauerwas v. Goodloe*, 162.
 7. *Contract violative of the public policy of the United States.*—A verbal contract by one who makes a homestead entry of government land and fails to perfect the same, to purchase such land, under act of Congress of June 15, 1880, (1 Sup. Rev. Stat. p. 558), and upon receipt of patent convey the lands to the one who furnishes the money with which to make the purchase, is violative of the policy of the General Government, and can not be made the basis of equitable relief to enforce a trust in such lands in favor of the one whose money was used in paying therefor. *Mulloy v. Cook*, 178.
 8. *Unauthorized alteration of written instrument.*—Any material alteration of a written instrument after its execution, without the maker's consent, avoids it, and discharges the maker from all obligations depending upon it. *Green v. Sneed*, 205.
 9. *Same; filling blanks in excess of authority.*—Where one of the parties to a written instrument, who is authorized to fill a blank in the instrument in a certain way, or by insertion of a certain amount, inserts in the blank matters or an amount not covered by the authorization, such alteration is material, and vitiates the instrument as between the original parties thereto, although the alteration was not made with fraudulent intent. *Ib.* 205.
 10. *Foreign corporations; executed contracts.*—Where a contract has been executed, there can be no relief granted because the transaction originated with a foreign corporation, which had not complied with the statutory requirements, prescribing the conditions on which it might transact business in this State. *Russell v. Jones*, 261.
 11. *Unilateral contract; when made valid.*—A contract, though void when made for the want of mutuality of obligation, becomes valid and binding, upon the performance by the promisee of that in consideration of which said contract was made. *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 446.
 12. *Contract of purchase and sale may become binding though unilateral when made.*—A contract of purchase and sale, conditioned upon the seller being able to have certain things done, though void when made because unilateral and imposing no enforceable obligation on the part of the seller, becomes valid and mutually binding upon the seller being able to have done the things, upon the performance of which the contract was conditioned. *Ib.* 446.
 13. *Same.*—Where an agreement in writing evidences a sale and purchase of a certain quantity of coke at a specified price, provided the seller is able to induce coke manufacturers to build ovens and make a certain portion of the stipulated amount of coke, and provides for notice by the seller at various times mentioned as to how much of the entire quantity of coke can be supplied during certain specified periods, and recites that the conditions of sale, binding the buyer to take the coke as specified and giving the seller the option to furnish it, are entered into to enable the seller to induce the manufacturers to build sufficient ovens by promising a certain sale of their product at a fixed price, the seller obligating himself to use his best endeavor to accomplish this end,—though at the time

CONTRACTS—*Continued.*

- made such agreement was unilateral, imposing no enforceable obligation on the seller and, therefore, not binding on the buyer, when the seller induces the manufacturers to build ovens sufficient in number to produce the requisite quantity of coke, the unilateral agreement is converted from a conditional and optional one into a mutually binding contract, imposing mutually enforceable obligations on the parties thereto, for the breach of which suit can be maintained. *Ib.* 446.
14. *Agency.*—Where a contract of sale and purchase of a certain quantity of coke is made between a furnace company and a coke company, upon condition that the coke company is able to induce coke manufacturers to build ovens sufficient in number to produce the requisite quantity of coke, and it is provided therein that the coke company will give notice to the furnace company as to how much of the entire quantity of coke can be supplied during certain periods, it being stated in said contract that such conditions are made to enable the coke company to induce the manufacturers to build the necessary ovens, for the accomplishment of which the coke company is to use its best efforts, there is no relation of principal and agent between the two companies; the coke company is in no sense the agent of the furnace company to purchase coke from the manufacturers for the latter company's benefit, but is the seller of the coke on its own account. *Ib.* 446.
 15. *Charge to the jury.*—Where, in an action against the buyer for the breach of a contract of sale of coke at a certain price per ton, "f. o. b. cars at Sheffield, Alabama," there is evidence tending to show that after making the contract the buyer agreed to pay freight on shipments as received, and thereafter paid freight for a considerable period for all coke which was delivered to it, without objection, a charge instructing the jury that "according to the written contract between the parties, the Hull Coal & Coke Company [the seller] was bound to pay the freight on the coke to Sheffield, and the defendant was not bound to pay the freight, and if the defendant, at the instance and request of the plaintiff voluntarily paid the freight up to the 1st of July, 1888, [the time of the last shipment] this did not bind them to pay the freight afterwards, nor exempt the plaintiff from the obligation to pay freight," is free from error, and should be given; the question as to whether the original contract, in respect to the payment of freight, was changed by a subsequent binding agreement between the parties, being a question for the determination by the jury from the evidence. *Ib.* 446.
 16. *Contract of sale; reduction of freight rates.*—In a contract of sale for a stipulated price at a certain place of delivery, a provision "that it is understood that" the seller has freight rates to the point of delivery, "on which the above price is based, but if, during the time this contract is in force this rate should be advanced, then the buyer has the option to take any undelivered portion due on his contract at the advance, or of cancelling it provided the seller does not elect to stand said advance," does not entitle the buyer to the benefit of reductions of freight rates accruing after the execution of the contract, and while it was being performed. *Ib.* 446.
 17. *Renunciation of contract; waiver thereof.*—Where a party to a contract offers to waive a renunciation of said contract by the other party on certain conditions, but the latter refuses to accept such offer, the party renouncing can not complain if the other party does finally accept and act upon the original renunciation. *Ib.* 446.
 18. *Contract of hiring; right of employer when satisfaction guaranteed.*—

CONTRACTS—*Continued.*

A contract of hiring by which the employé "guarantees to give satisfaction," invests the employer with full power to determine whether the labor performed is satisfactory, and the reasonableness of the grounds of dissatisfaction can not be inquired into by a court in an action brought by the employé for the wages which would have accrued under said contract subsequent to his discharge. *Allen v. Mutual Compress Co.*, 534.

19. *Infants; ratification after attaining majority.*—A contract by an infant, being merely voidable and not void by reason of the infancy, is subject to ratification after attaining majority, and any declarations or acts by the infant, after arriving at full age, that clearly recognize the existence of the contract as a binding obligation, will constitute a ratification, although at the time of the declaration made or the act done the infant did not know that he or she had a right to avoid the contract. *Amer Mortg. Co. v. Wright*, 658.

CORPORATIONS.—

I. CORPORATIONS IN GENERAL.

1. *Agents of a corporation; appointment.*—No formalities are essential to the appointment of an agent of a corporation unless expressly provided by its charter. They may be appointed in the same manner as the agents of individuals; and if a person is allowed to act as agent for a corporation, with the knowledge and acquiescence of a superior agent, or of one in authority who has power to appoint him, the corporation will be bound by such acquiescence, and can not repudiate the agency. *Tenn. River Transportation Co. v. Kavanaugh Bros.*, 1.
2. *Power of general agent under appointment by resolution of board of directors.*—An agent of a corporation, who, by a resolution of the board of directors of said company, is "authorized to take full charge of the company's business, and to enter into such negotiations and contracts as he thinks best for the company's interest," has power to do any act within the scope of the business operations of the corporation, and in the discharge of such duties has authority to appoint an agent with power to make contracts to bind the company. *Ib.* 1.
3. *Same; power of local agent appointed by general agent.*—Where a general agent of a corporation, with plenary powers conferred by resolution of its board of directors, introduces to third persons his appointee as the local agent of the corporation, with the assurance that any transaction had with the said local agent would be entirely satisfactory to and approved by the corporation, the corporation can not be relieved of its liability on a contract made by such local agent with the parties to whom he was introduced, by showing that the contract was, in fact, in excess of his powers. *Ib.* 1.
4. *Evidence of agency.*—In an action against a corporation founded upon a contract alleged to have been made with the defendant's agent, it is competent to prove, as tending to show the existence of the agency, that the alleged agent had made contracts with other persons as such agent, which were ratified by the defendant corporation. *Ib.* 1.
5. *Agent of corporation at a particular place; irrelevant testimony.*—In an action against a corporation, founded upon a contract made with the defendant's agent, the question at issue being whether the person with whom the plaintiffs dealt was, in fact, the defendant's agent at a certain place, evidence that he transacted business for the corporation at another place sheds no light upon the inquiry, and is irrelevant. *Ib.* 1.

CORPORATIONS—*Continued.*

6. *Admissions of agent against his principal; admissibility as a predicate for impeachment.*—Although in an action against a corporation, founded upon a contract alleged to have been made with the defendant's agent, an admission made by such agent is not competent evidence against his principal, unless that admission was made in company with, and at the time of the act of agency which it was intended to explain; still the question which calls for such evidence may be admissible for the purpose of laying a predicate for the introduction of impeaching testimony. *Ib. 1.*
7. *Exercise by agent of powers not expressly conferred; when binding.*—When, in the discharge of the duties imposed upon him, it becomes necessary for the agent of a corporation to take immediate action, and a consultation with the governing board would be impracticable, such agent may, in the interest of conservation, exercise powers not expressly conferred upon him; and such action is binding upon the corporation. *Ib. 1.*
8. *Appointment of a receiver upon a bill filed to dissolve a corporation.*—When a bill filed by stockholders to dissolve a corporation, as provided by statute (Code, § 1683), contains averments which show a necessity for the appointment of a receiver for the corporation pending the proceedings for dissolution, a chancery court may appoint such receiver. *Florence Gas, El. Light & Power Co. v. Hanby, 15.*
9. *Powers of receiver appointed pending proceedings for the dissolution of a corporation.*—When a bill which seeks the dissolution of a corporation contains averments showing special grounds for the appointment of a receiver pending such proceedings, the receiver to be appointed by the court is authorized, not only to execute and perform the existing contracts of the corporation, but also to enter into and carry out new contracts in behalf of the company. *Ib. 15.*
10. *Appointment of receiver; can not be questioned in collateral proceedings.*—On a bill filed by the receiver of a corporation, who was acting under an appointment made after the dissolution of the company (Code, §§ 1683-86), the validity of his former appointment as receiver, pending the dissolution proceedings, can not be assailed; said attack being made in a collateral proceeding. *Ib. 15.*
11. *Power of receiver of dissolved corporation to carry out existing contract.*—While a receiver, appointed under section 1686 of the Code has no authority, as a general rule, to carry out and perform existing contracts of the dissolved corporation, and can only be empowered to perform such conditions as are prescribed by said section, he may nevertheless, complete the execution of an existing contract, when such execution is necessary to the discharge of the duties and powers expressly imposed and conferred by such statute. *Ib. 15.*
12. *Specific performance of a contract; when not enforceable.*—When, on a bill filed by a receiver of a dissolved corporation, seeking the specific performance of a contract made between such corporation and another company, it is shown that in the contract the corporation, of which the complainant is the receiver, agreed to construct an electric light plant for the defendant corporation, and to pay off debts due from the defendant corporation, some of which were secured by a mortgage, and that the defendant agreed to issue first mortgage bonds to the construction company, to secure the debt arising from the performance of the work stipulated, with leave to take the bonds in absolute payment after a certain time, a specific performance of such a contract can not be decreed, when the bill contains no averment that the debts due from the defendant to third parties, which

CORPORATIONS—*Continued.*

- were agreed to be paid by the construction company, had been paid, nor an averment of an offer, or even a readiness or willingness to pay such debts; the failure of the construction company to perform its part of the contract by paying the debts, making a specific performance of the contract by the defendant, by the delivery of first mortgage bonds, impossible. *Ib. 15.*
13. *When authority of a corporation is to be presumed.*—When a bill is filed by the receiver of a dissolved corporation for the enforcement of a mechanic's and material-man's lien, and the specific performance of a contract for certain work done, it is to be presumed, in the absence of any averment to the contrary, that the construction company was authorized by its charter to enter into and perform the contract involved in said suit. *Ib. 15.*
 14. *Acts and contracts of agent as binding corporation; ratification.*—In the ordinary dealings of construction and trading corporations, it is often impracticable for a company to speak and act through its governing body, and when acting through agents within the scope and purview of their chartered powers, the same intendments and complications arise, as spring out of similar actions or conduct of natural persons; and acts of a person assuming to represent such corporation, and transactions with him, in the line of the business of said corporation, even though without express authority, become binding on the corporation, if subsequently ratified by it, and such ratification may be made expressly or by mere acquiescence, or by a failure to repudiate the act, knowing it to have been done. *Bibb v. Hall, 79.*
 15. *Unauthorized transfer of notes by officer of a corporation; ratification thereof.*—A corporation was formed for the purpose of building a railroad, and became indebted to a bank for money borrowed to carry on its work. The corporation was forced to borrow money almost from the day of its organization, and in every instance was compelled to give collateral security; the board of directors had, in many instances, authorized the transfer of collaterals by the president for the purpose of borrowing money; and had even authorized the mortgaging of its lands by its president for that purpose; the books of the corporation were kept open at their principal office, and all transactions were entered upon them; and the directors knew of the large indebtedness of the said corporation to the bank. Without express authority from the directors, or the stockholders, the president, as the active financial agent of the said corporation, transferred to said bank, as collateral security for said indebtedness, a note of subscription to the capital stock of the railroad company, which had been transferred to the said construction company. Subsequent to this transfer, six of the nine directors of said corporation separately signed, but not at a meeting of the directory, a paper ratifying this transfer by the president to the bank of the said note as collateral security. *Held*, that said transfer was ratified by the corporation, and was binding. *Ib. 79.*
 16. *Formation of a corporation under the general law; legal existence can not be assailed collaterally.*—For the formation of a corporation under the general law, a substantial compliance with all the terms of the general corporation law, having reference to the character of the corporation to be formed, is a prerequisite to its organization; but when an association of persons is found in the exercise and use of corporate franchises, under color of legal organization, their existence as a corporation can not be inquired into collaterally. The corporation exists *de facto*, and is subject to all the liabilities, duties and responsibilities of a corporation *de jure*. *Ib. 79.*
 17. *Estoppel by contract with a corporation.*—One who contracts with

CORPORATIONS—*Continued.*

a corporation having a *de facto* existence, and the reputation of a legal corporation, in the actual exercise of corporate powers and franchises, is estopped from denying the legality of the existence of the corporation, or inquiring into the irregularities attending its formation to defeat a contract, or to avoid the liability he voluntarily and deliberately incurred; and especially is this true as to stockholders seeking to avoid a liability to creditors of a corporation.—*Ib.* 79.

18. *Repeal of general corporation laws; effect as to corporations formed thereunder.*—The repeal of a general corporation law can not be construed, in the absence of express provisions, as intended to repeal the charters of corporations formed under such law previous to its repeal, when the manifest purpose of the repealing act is to substitute a new law, extending the provisions of the old, supplying omissions, and perfecting its details, without changing its general policy, or interfering with corporations formed under it. *Ib.* 79.
19. *Ratification by corporation of acts by its promoters.*—A corporation, after its organization, has the power to accept and ratify the agreements and covenants of its promoters, made to effect or carry out the purposes of its organization, and, when accepted and ratified, such agreements and covenants are mutually binding. *Davis v. Montgomery Furnace & Ch. Co.*, 127.
20. *Issue of stock by corporation; when presumed to be legal.*—When it is shown that all the capital stock of a corporation has been subscribed and paid for in full, and there is no evidence as to the value of the consideration paid for said stock, it will be presumed that it was adequate, and a court can not declare the issue of such stock fictitious or violative of Article XIV, § 6 of the constitution, or of section 1662 of the Code of 1886. *Ib.* 127.
21. *Subscribers to corporate bonds; when not liable as stockholders.*—When stock, which has been subscribed, paid for and issued, upon adequate consideration, is by the holders thereof placed in the hands of a trustee to be paid over to subscribers for bonds of the corporation, when their subscriptions to such bonds are paid in full, such stock, so delivered to the trustee, may be transferred by him to the subscribers for bonds, upon payment of their subscriptions, without contravening the constitution and statutes of the State, (Const. Art. XIV, § 6; Code, § 1662); and the failure to pay their subscriptions for the bonds, does not make such subscribers for said bonds liable upon the stock agreed to be delivered, as upon unpaid subscription for stock. *Ib.* 127.
22. *Subscribers to bonds of a corporation; liable as garnishees.*—Where the contract of subscription to bonds of a corporation provides that upon the payment of the entire amount of the subscription an equal amount of fully paid-up stock of the corporation shall be paid over to the holders of the bonds, and that the subscription is to be paid in monthly instalments of fixed sums, a subscriber to the bonds under such contract, who has paid three instalments, is a debtor to the corporation for the balance due upon his subscription, in such sort as to be subject to process of garnishment by creditors of the corporation, and liable as garnishee to the extent of such balance due and unpaid upon his subscription for the bonds. *Ib.* 127.
23. *Lien of corporation on stock.*—Section 1674 of the Code of 1886, which provides that "all private corporations have a lien on the shares of its stockholders, for any debt or liability incurred to it by a stockholder, before notice of the transfer, or of a levy of such shares," confers the lien therein provided to secure debts which had been contracted before its enactment, as well as those

CORPORATIONS—Continued.

- contracted afterwards. *Birmingham Trust & Sar. Co. v. East Lake Land Co.*, 304.
24. *Bill to enjoin sale of stock; necessary averments.*—In a bill by a stockholder to enjoin the sale by the corporation of his stock, in payment of his debt to said corporation, on the ground that he has a claim against the corporation in excess of his alleged indebtedness, the complaint must aver some fact other than the existence of his demand, which is a proper subject of set-off in order to give his bill equity—such as the insolvency of the corporation, or any other fact respecting his alleged claim, which would justify the interposition of a court of equity. *Elliott v. Sibley, et al.* 344.
 25. *Bill to enjoin sale of stock; corporation necessary party.*—Where a bill is filed by a stockholder to enjoin the sale by a corporation of his stock to settle an indebtedness due to the corporation, upon the ground that the debt is not due, or has been paid, or that the corporation is indebted to the shareholder in an amount exceeding that claimed to be due the corporation, and which prays for a settlement of account, the corporation itself is an indispensable party. *Ib.* 344.
 26. *Same; complainant must offer to do equity.*—In a bill, filed by a stockholder to enjoin the sale of his stock by a corporation, on the ground that the corporation is indebted to him in an amount exceeding his indebtedness, and which also prays for a settlement of account, the complainant must offer to do equity by averring in his bill a readiness and willingness to pay whatever amount may be ascertained to be due from him to the corporation. *Ib.* 344.
 27. *Enforcement by a corporation of a lien under section 1674; no action by directors necessary.*—In order that a corporation may enforce the lien given it by statute, (Code, § 1674), against a stockholder to collect a past due indebtedness from him, there is, *prima facie*, no action necessary on the part of the directors; and the averment in the bill filed by a stockholder to enjoin the sale of his stock to collect a debt fixed by contract, that the directors of the corporation have taken no action to authorize the threatened sale, can not give the bill equity. *Ib.* 344.
 28. *Regularity of election of officers of a corporation; inquiry by court of equity.*—A court of equity will inquire into the regularity of the election of the directors of a corporation only when the question arises incidentally or collaterally in a suit of which the court otherwise has jurisdiction, and the granting of the relief prayed for depends upon its decision. *Ib.* 344.
 29. *Bill to remove directors of a corporation from office; want of equity.*—When, in a bill filed by a stockholder to enjoin the sale by the corporation of his stock, and which also prays for the removal from office of certain persons claiming to be directors of said corporation, there are no averments which show that complainant's defense to the claim of the corporation is in any way affected by acts of the alleged illegal directors of the corporation, the bill, while perhaps not multifarious, is wanting in equity, so far as it seeks to have the said directors removed from office. *Ib.* 344.
 30. *Bill filed by corporation; failure to aver a right to acquire property.*—A bill filed by a corporation to quiet its title and to remove a cloud therefrom is not demurrable because it fails to aver that the complainant corporation had the power under its charter to acquire and hold the lot; in the absence of proof to the contrary, the corporation will be presumed to have had such power. *Torrent Fire Engine Co. v. City of Mobile*, 559.
 31. *Bill by stockholder to enjoin another corporation from voting its stock*

CORPORATIONS—*Continued.*

- in election of officers, etc.; laches.*—Where a bill is filed by stockholders in a corporation to enjoin another corporation owning a majority of the stock of the former corporation from voting its stock in the control of the affairs and in the election of the officers of the said corporation, the fact that the complainant stockholders, after full knowledge of the grounds of complaint alleged in their bill, or full opportunity to acquire such knowledge, acquiesced in the acts complained of for more than six years, does not debar them from having enjoined such use of the stock in the future. *George v. Cen. R. R. & B. Co.*, 607.
32. *Injunction against a corporation at suit of stockholders; previous request to directors for action.*—A minority of the stockholders of a corporation can not maintain a bill in equity to prevent illegal action on the part of the majority, without a previous request to the proper officers to interfere, and their failure or refusal to do so; but when it is shown that a majority of the stock of said corporation is owned by another corporation, which practically creates and controls the managing and governing bodies of said corporation, the necessity for such a demand is dispensed with, as any such demand would be fruitless. *Id.* 607.

II. FOREIGN CORPORATIONS.

33. *Foreign corporations; executed contract.*—Where a contract has been executed, there can be no relief granted because the transaction originated with a foreign corporation, which had not complied with the statutory requirements, prescribing the conditions on which it might transact business in this State. *Russell v. Jones*, 261.
34. *Penal statutes; act regulating the doing of business by foreign corporations in this State.*—The act approved February 24, 1887, "to give force and effect to section 4, Article XIV of the constitution," which regulates the manner of conducting business in this State by foreign corporations, which prescribes the penalties for the violation of the fundamental law in reference thereto, and which provides means for the enforcing and collecting such penalties, is a penal statute under the law (Code, § 3705), and did not go into effect until thirty days after the adjournment of the General Assembly at which it was passed; the act itself not specifically providing for an earlier date for it to take effect.—*Ross v. N. E. Mort. Sec. Co.*, 362.
35. *Mortgage to foreign corporations; when not controlled by act approved February 28, 1887.*—The act approved February 28, 1887, "to give force and effect to section 4, Article XIV of the constitution," is a penal law, and a mortgage executed by a resident of this State to a foreign corporation on March 1, 1887, being executed within thirty days after the adjournment of the General Assembly, at which said act was passed, is not governed by its provisions, and not being violative of any other statute, is a valid and binding contract between the parties. *Ib.* 362.
36. *Bill to cancel mortgage; offer to do equity.*—Before a court of equity will grant relief on a bill filed to have a mortgage declared void and cancelled as violative of constitutional and statutory provisions, the complainant must offer to do equity by refunding the money he has received under the mortgage; but an offer in such a bill, that if the debt past due is "held valid in any event, complainant hereby offers and is able and willing and ready to pay the same," is not such an offer to do equity as the law requires. *Ib.* 362.
37. *Same; requisites for foreclosure.*—Where a bill is filed by the

CORPORATIONS—*Continued.*

mortgagor to have his mortgage declared void and cancelled, there can be no decree of foreclosure of said mortgage (in the absence of a cross-bill by the mortgagee, praying a foreclosure), unless the complainant in his bill offers to do equity, and submits himself to the authority and jurisdiction of the court; but an averment in the bill that, if "the court should ascertain that said mortgage is void, and should order a reference to the register to ascertain and report the amount due from the complainant to the respondent, he is ready and willing to pay the same," is neither such an offer to do equity, nor such a submission of the complainant to the authority and jurisdiction of the court as would justify a decree of foreclosure. *Ib.* 362.

38. *Same; when decree of foreclosure erroneous.*—When, on a bill filed to have a mortgage executed on March 1, 1887, to a foreign corporation declared void and cancelled, as violative of section 4, Article XIV of the constitution and the act approved February 8, 1887, to give force and effect to this constitutional provision, there is no sufficient offer by complainant to do equity, or to submit himself to the authority and jurisdiction of the court, and the proof shows that the defendant has complied with the requirements of the said constitutional and statutory provisions, at the time of making the loan and taking the mortgage to secure it, a decree of foreclosure should not be rendered, but the bill, being without equity, should be dismissed. *Ib.* 362.

III. MUNICIPAL CORPORATIONS.

39. *Duty of the mayor of a city.*—It is the duty of the mayor of a city to take judicial notice of the appointment of police commissioners for his city, their organization and selection of proper officers, when properly certified to him; and he could not lawfully refuse to administer the oath of office to an officer appointed by the commission, which appointment was certified to him, nor had he the right to inquire into the regularity of said appointment. *For v. McDonald*, 51.
40. *Construction of a statute incorporating a town.*—An act of the general assembly incorporating a town, which declares that the corporate limits shall be "one mile each way, north, south, east and west from the court house square," as laid out by a land company, will be construed to fix the boundary lines of the corporate limits of said town to be almost a circle, with a radius of one mile, with its center at the court house square; and a place of business two hundred yards southwest from the court house square is within the corporate limits. *Town of Luverne v. Shaw*, 359.
41. *Liability of municipality for damages for changing grade of streets.*—Under the constitutional provisions now of force, (Const. Art. XIV, § 7), a municipal corporation is liable in damages for injuries caused to property abutting on a street, by so changing the grade of said street as to prevent the natural flow of the water from said adjacent property. (City Council v. Townsend, 80 Ala. 489, s. c. 84 Ala. 472, overruled to this extent.)—*Town of Arondale v. McFarland et al.*, 381.
42. *Action under sub-section 2 of section 2590 of the Code; sufficiency of complaint.*—In an action against a municipal corporation by a laborer employed by it, to recover damages for personal injuries, a count of the complaint which alleges that the defendant, through its agents and employes, intrusted with the superintendence of the work of digging gravel, buried a dynamite cartridge where said gravel was being dug, and that the plaintiff, being employed by defendant, was required to work at the place

CORPORATIONS—*Continued.*

where the dynamite was buried, without being told that it was there, and that while digging as directed, not knowing the dynamite was buried at such place, struck said cartridge causing it to explode and inflicting upon him serious personal injuries, sets forth a good cause of action under sub-section 1 of section 2590 of the Code, which gives a right of action to an employé "When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence." *City Council of Sheffield v. Harris*, 564.

43. *Municipal corporation bound by acts of its agent or employé; when estopped from denying the legality of his appointment.*—Where one has served a municipal corporation in the capacity of superintendent of certain work carried on by said city, and the municipal authorities have accepted such service and received the benefit of his skill and labor, the municipal corporation can not avoid its responsibility for injuries resulting from his negligence in the doing of work within the scope of the service he was rendering, by denying the legality of his appointment. *Ib.* 564.
44. *Action under sub-section 2 of section 2590 of the Code; erroneous charge to the jury.*—In an action against a municipal corporation by one of its employés, under sub-section 2 of section 2590 of the Code, to recover damages for personal injuries, alleged to have been caused by the negligence of the agent or employé of the defendant intrusted with the superintendence of the work at which the plaintiff was engaged, while in the exercise of such superintendence, in allowing a dynamite cartridge to be left at the place where the plaintiff was required to work, it is error to instruct the jury that, "If the dynamite causing the plaintiff's injury was carelessly and negligently left buried by the defendant, or its servants or agents in the discharge of their duty, before the plaintiff was employed by the defendant, and the plaintiff could not by the use of ordinary care and diligence, or precaution, have discovered the danger, then, I charge you, that the defendant is liable in this action, and your verdict should be for the plaintiff for such amount as you believe from the evidence he was damaged, not exceeding \$8,000"—the amount sued for. *Ib.* 564.

COSTS.

1. *Title and subject matter of statutes under constitutional provisions.*—The act approved February 21, 1893, entitled "An act to provide for and regulate the pay of State witnesses in Tuscaloosa county," (Acts 1892-93, pp. 934-936), is violative of the constitutional provision that "each law shall contain but one subject which shall be clearly expressed in its title," (Cons. Art. IV, § 2), because the said act not only undertakes to provide for and regulate the payment of State witnesses, but also the payment of officers' costs accruing in behalf of the State, which latter provision was to a subject matter not expressed in the caption of the act. *Yerby v. Cochran*, 541.
2. *Same; when whole act declared void.*—Since the provisions of said act in relation to the payment of officers' costs (the subject not expressed in the title) can not be separated from the provisions in reference to the payment of State witnesses, so that the former may be stricken from the act and leave the statute complete within itself, capable of being executed, and wholly independent of those provisions which are rejected, the whole act is void. *Ib.* 541.

COSTS—*Continued.*

3. *Same.*—When a statute contains two subject matters, only one of which is clearly expressed in the title, and the provisions in reference to these separate subjects are not separable, so that the provisions in reference to the subject which is not expressed in the title can not be stricken out and leave the act to operate according to its terms and the clear intent of the legislature, the whole of the act is unconstitutional and void. *Ib.* 541.

COUNTIES.

1. *Creation of new county; transfer of administration from probate court of old to new county.*—The legislature, in the passage of the act approved December 7, 1866, (Acts 1866-67, p. 92), creating the county of Clay out of portions of Talladega and Randolph, made no provision concerning the administration of estates pending in the probate courts of the old counties; and in the absence of any such provision such administrations continued in the probate courts of the parent counties, unaffected by the formation of the new county, although the property of the estate is situated, and the administrator resides, in the new county. *Page et al. v. Bartlett et al.*, 193.
2. *Same.*—In an act forming a new county out of portions of old counties, a provision for the transfer of suits pending against defendants from the courts of old counties into those of the new, without referring to administrations pending in the former, is to be construed as an expression of legislative intent that such administrations should not be removed into the probate court of the new county. *Ib.* 193.
3. *Same; transfer of administration from probate to chancery court.*—Where an act forming a new county out of portions of two old counties makes no provision concerning the administration of estates pending in probate courts of the older counties, if it becomes necessary or proper to transfer into a court of equity the settlement of the administration of an estate situated in the new county, but which was pending in the probate court of one of the older counties, such settlement must be removed into the chancery court of the old county in whose probate court such administration was pending; the chancery court of the new county having no jurisdiction thereof. *Ib.* 193.
4. *Clerk's fees for summoning defendant's witnesses; not payable out of the fine and forfeiture fund.*—The fees of a clerk of a court for issuing subpoenas for witnesses in a criminal case at the request of a defendant, who was acquitted, can not be paid out of the fine and forfeiture fund of the county; such services of the clerk being rendered for defendant create a debt against him, and must be paid by him. *Burgin v. Hawkins*, 326.
5. *Action of assumpsit against a county; when not maintainable.*—An action of assumpsit can not be maintained against a county, to recover the amount paid for the hire of a servant to keep up the fires in the county jail, and to supply it with water. *Marengo County v. Lyles*, 423.
6. *When mandamus the proper remedy.* When the sheriff or jailor seeks to be reimbursed for money paid for the hire of a servant to keep up the fires in the county jail, and to supply the jail with water, his claim must be presented to the court of county commissioners, and upon their failure to allow it, his remedy is by *mandamus*, to compel said court to make the proper appropriation. *Ib.* 423.
7. *County certificates not commercial paper.* County certificates, issued for jurors' and bailiffs' services, are not negotiable commercial paper, and the purchaser thereof takes them subject to

COUNTIES—Continued.

- all the defenses which the county may have against the transferor. *Allen, Bethune & Co. v. McCreary et al*, 514.
8. *Purchase by treasurer's deputy of county certificates.* A purchase by a county treasurer's deputy, who performs all the duties of the office, of jurors' and bailiffs' certificates when he has county funds in his hands, and which he does not account for on the expiration of his term of office, is in law a payment of such certificates of the county with the county funds which were unaccounted for, and the transferee of the deputy can not collect them from said treasurer's successor in office. *Ib* 514.
 9. *Title and subject matter of statutes under constitutional provisions.*—The act approved February 21, 1893, entitled "An act to provide for and regulate the pay of State witnesses in Tuscaloosa county," (Acts 1892-93, pp. 934-936,) is violative of the constitutional provision that "each law shall contain but one subject which shall be clearly expressed in its title," (Const. Art. IV, § 2), because the said act not only undertakes to provide for and regulate the payment of State witnesses, but also the payment of officers' costs accruing in behalf of the State, which latter provision was to a subject matter not expressed in the caption of the act. *Yerby v. Cochrane*, 541.
 10. *Same; when whole act declared void.*—Since the provisions of said act in relation to the payment of officers' costs (the subject not expressed in the title) can not be separated from the provisions in reference to the payment of State witnesses, so that the former may be stricken from the act and leave the statute complete within itself, capable of being executed, and wholly independent of those provisions which are rejected, the whole act is void. *Ib* 541.
 11. *Same.* When a statute contains two subject matters, only one of which is clearly expressed in the title, and the provisions in reference to these separate subjects are not separable, so that the provisions in reference to the subject which is not expressed in the title can not be stricken out and leave the act to operate according to its terms and the clear intent of the legislature, the whole of the act is unconstitutional and void. *Ib* 541.
 12. *Unconstitutionality of act extending operation of former act.*—The act approved February 9, 1893, entitled "An act to declare inoperative an act entitled 'An act to change the boundary line between the counties of Talladega and Clay in this State,' approved January 10, 1877, and to provide for the location of the line between said counties," is violative of so much of section 2, Article IV of the Constitution as provides that no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only. *Miller v. Berry*, 531.
 13. *Act to pay solicitors' salaries; counties' right to surplus in the state treasury.*—Under the provisions of the "act to pay solicitor's salaries," approved February 28, 1887, (Acts 1886-87, p. 161), there must be annual adjustments and ascertainties of the surpluses of solicitors' fees paid into the state treasury over and above the salaries of solicitors, by deducting the aggregate of the salaries of solicitors from the aggregate of all solicitor's fees paid into the state treasury during the preceding year, from whatever source derived; and each county is then entitled to receive its proportionate share in the remainder. *Purifoy v. Andrews*, 643.
 14. *Same; computation without regard to judicial circuits or act of February 25, 1889.*—Such annual adjustments and ascertainties must be made without regard to the judicial circuits, and are unaffected by the act approved February 25, 1889, (Acts 1888-89, p. 55), providing for payments out of the state treasury of the costs in cases where the defendants are sentenced to imprisonment in the penitentiary. *Ib* 643.

COUNTIES—*Continued.*

15. *Mandamus, to compel auditor to draw warrant for counties' shares of surpluses in state treasury from solicitor's fees.*—After adjustment and ascertainment of the surplus of solicitors' fees in the state treasury, over and above the salaries paid solicitors, as provided by act of February 28, 1887, (Acts 1886-87, p. 16.) the auditor must draw his warrants on the treasurer in favor of the counties, respectively, for the several sums ascertained to be due them; and upon his refusal to do so, he may be compelled there-to by *mandamus*. *Ib.* 643.

COUNTY TREASURER.

1. *Purchase by treasurer's deputy of county certificates.*—A purchase by a county treasurer's deputy, who performs all the duties of the office, of jurors' and bailiffs' certificates when he has county funds in his hands, and which he does not account for on the expiration of his term of office, is in law a payment of such certificates of the county with the county funds which were unaccounted for, and the transferee of the deputy can not collect them from said treasurer's successor in office. *Allen, Bethune & Co. v. McCreary*, 514.

COURTS.

I. COMMISSIONERS COURT.

1. *When mandamus the proper remedy.*—When the sheriff or jailor seeks to be reimbursed for money paid for the hire of a servant to keep up the fires in the county jail, and to supply the jail with water, his claim must be presented to the court of county commissioners, and upon their failure to allow it, his remedy is by *mandamus*, to compel said court to make the proper appropriation. *Marengo County v. Lyles*, 423.

II. PROBATE COURT.

2. *Creation of new county; transfer of administration from probate court of old to new county.*—The legislature, in the passage of the act approved December 7, 1866 (Acts 1866-67, p. 92), creating the county of Clay out of portions of Talladega and Randolph, made no provision concerning the administration of estates pending in the probate courts of the old counties; and in the absence of any such provision such administrations continued in the probate courts of the parent counties, unaffected by the formation of the new county, although the property of the estate is situated, and the administrator resides, in the new county. *Page v. Bartlett*, 193.
3. *Suane.*—In an act forming a new county out of portions of old counties, a provision for the transfer of suits pending against defendants from the courts of the old counties into those of the new, without referring to administrations pending in the former, is to be construed as an expression of legislative intent that such administrations should not be removed into the probate court of the new county. *Ib.* 193.
4. *Same; transfer of administration from probate to chancery court.*—Where an act forming a new county out of portions of two old counties makes no provision concerning the administration of estates pending in probate courts of the older counties, if it becomes necessary or proper to transfer into a court of equity the settlement of the administration of an estate situated in the new county, but which was pending in the probate court of one of the older counties, such settlement must be removed into the chancery court of the old county in whose probate

COURTS—Continued.

- court such administration was pending; the chancery court of the new county having no jurisdiction thereof. *Ib.* 193.
5. *No appeal lies from a judgment of a probate court in condemnation proceedings to the supreme court.*—No appeal lies directly to the supreme court from any proceeding, judgment, order or decree of the probate court made or entered therein in proceedings to condemn a right of way for a railroad, as provided by the statute, (Code, §§ 3207-3220). *L. & N. R. R. Co. v. The Peoples St. Railway & Imp. Co.*, 331.
 6. *Petition for sale of lands to pay decedent's debts; sufficient averments.* A petition by an administrator for an order to sell lands belonging to the estate of his intestate for the payment of his debts (Code, §§ 2104, 2106), which alleges that "the personal property of said estate is insufficient for the payment of the debts thereof, and that therefore it is necessary, and will be to the interest of said estate, to sell the lands hereinafter named, for the payment of the debts of said estate," is sufficient to confer jurisdiction on the probate court to decree a sale of said lands. *Kent v. Mansel*, 334.
 7. *Decree of sale of decedent's lands; presumption in favor of the decree of the probate court on collateral attack.*—When, in an action of ejectment, a decree of the sale of decedent's lands is attacked, on the ground that the evidence in the proceedings in the probate court was not taken in the manner required by statute (Code, § 2111), the order of sale of said lands by the probate court is not set out in the record, but the statement is made that the court rendered a decree ordering said lands to be sold for the payment of the debts of said estate, this court, on appeal, will presume that the order or judgment of the probate court contained all that was necessary to uphold its validity, including the finding that proof of the necessity of the sale to pay the debts was made by disinterested witnesses, as provided by the statute, and that such order was sufficient. *Ib.* 334.
 8. *Order of sale collaterally attacked; error must affirmatively appear on the face of the record.*—When a decree of the probate court ordering the sale of the decedent's lands for the payment of debts is collaterally attacked, the decree will not be annulled and set aside, unless the matters relied on as avoiding the adjudication appear affirmatively on the face of the record. *Ib.* 334.
 9. *Application to vacate probate of a will; no presumption in favor of the probate.*—(On the application to vacate the probate of a will, there is no presumption in favor of the order of probate; the petition to vacate being a direct and not a collateral attack. *Herrings v. Ricketts*, 340.
 10. *When ruling by judge of probate in election contest not reviewed on appeal.*—Under the statutory provision, that "In contested election cases tried by the judge of probate, an appeal lies to the circuit court, to be tried *de novo*" (Code, § 432), rulings made by the judge of probate in contest proceedings instituted before him, even though erroneous, which were not carried into the rulings of the circuit court on appeal from the probate court, will not be reviewed by the supreme court. *Turnipseed v. Jones*, 593.

CUSTOM AND USAGE.

1. *Custom and usage.*—The fact that in a town where goods were sold by a travelling salesman by sample, there prevails a custom for the merchants to pay said salesmen for the goods pur-

CUSTOM AND USAGE—*Continued.*

- chased, does not authorize or justify the payment to such travelling salesman, the agent of a non-resident firm, unless it is also shown that the principal had notice of such custom. *Sinon & Son v. Johnson*, 368.
2. *Custom and usage; irrelevant evidence.*—In an action on a verified account, when it is shown that the account sued on had been paid to plaintiffs' travelling salesman, who sold the goods by sample, but had no authority to receive payment therefor, evidence that in a town where the sale was made it was a custom among the merchants to pay the travelling salesman for goods purchased, is not competent in the absence of other evidence tending to show that the principal had notice of such custom. *Ib.* 368.
 3. *Custom and usage; admissibility of evidence thereof.*—Evidence of custom and usage is not admissible to explain or extend the meaning of a written contract, unless the terms of such written contract are ambiguous and uncertain. *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 446.
 4. *"f. o. b."; judicial knowledge.*—Courts judicially know that "f. o. b." in contracts of sale, where the property sold is to be transported, mean, "free on board" the cars at a certain place named in the contract. *Ib.* 446.
 5. *Same; evidence of custom and usage.*—Where a contract of sale specifies the price of the article sold, "f. o. b. cars" at a certain place of destination, named in the contract, parol evidence of the custom and usage as to the payment of freight on the particular article sold, which would give to the terms a different meaning or operation than would have attached had the words of which they are the initials been originally inserted in the contract, is inadmissible: in such a contract the price stipulated is for the articles free on board the cars at the place of destination, and does not impose upon the buyer the duty of paying the freight thereon. *Ib.* 446.

DAMAGES.

1. *Action on replevy bond; plaintiff entitled to compensation for damage to property injured; evidence of damage admissible.*—When, after the execution of a replevy bond by the defendants in an action of detinue, and pending the suit, a portion of the property replevied is damaged, but not wholly destroyed, by fire, the plaintiff is entitled to compensation for the injury to the property, and evidence tending to show the amount of damage is competent and relevant. *Heard v. Hicks*, 102.
2. *Same; waiver of claim for damages by plaintiff a question for the jury.*—In an action on a replevy bond, when there is testimony tending to show that after the alleged tender of the property replevied by the defendants, the plaintiff exercised control over the property tendered, it is a question for the jury, whether or not he refused such property, and shall be held to have waived his claim for damages to it while in defendant's possession. *Ib.* 102.
3. *New trial; excessive damages.*—In an action by contractors for refusing to permit them to perform the contract to build store-houses for defendants, at the gross price of \$4,500, where one of the plaintiffs, as a witness, estimated the cost to build at \$3,040, but omitted from his estimate certain items of cost to his firm, the propriety of including which was not questioned when testified to by an expert, who placed their cost at \$1,100, a judgment for the plaintiff in the sum of \$500 is excessive: and the court, on plaintiff's refusal to abate their judgment

DAMAGES—Continued.

- to the extent of \$150, properly grants a new trial, on motion of the defendant. *Prince & Blackman v. Blawinger*, 358.
4. *Liability of municipality for damages for changing grade of streets.* Under the constitutional provisions now of force (Const. Art. XIV, § 7), a municipal corporation is liable in damages for injuries caused to property abutting on a street, by so changing the grade of said street as to prevent the natural flow of the water from said adjacent property. (*City Council v. Townsend*, 80 Ala. 489, s. c. 84 Ala. 472, overruled to this extent.) *Town of Avondale v. McFarland*, 381.
 5. *Plea of set-off; when not sustained by evidence.*—When, in an action on a note, there is interposed a plea of set-off, founded upon damages claimed by reason of plaintiff's failure to deliver certain goods as agreed upon when the note sued on was executed, but the defendant does not introduce evidence of the difference between the contract price of the goods and their value at the time and place of delivery, and thereby fails to furnish a basis for the ascertainment of the damages claimed, the plea of set-off is not sustained, and judgment should be rendered for plaintiff on such plea. *Harwell & Clark v. Lehman & Son*, 625.

MEASURE OF DAMAGES.

6. *Measure of damages in trover for conversion of wood.*—In an action of trover for the conversion of wood wrongfully cut from the leased premises, the measure of damages is the value of the wood at the time of the conversion, with interest to the time of trial. *Brooks v. Rogers*, 111.
7. *Charges invasive of the province of the jury.*—In an action of trover for the conversion of timber wrongfully cut from the leased premises, a charge instructing the jury that if they believe from the evidence that the defendant cut down the trees and converted them under the belief that he had the right to do so under the lease, they "should fix the value of the wood at the place it was cut, after deducting the cost of cutting the same, and after deducting the cost of hauling the same," is properly refused as being invasive of the province of the jury. *Ib.* 111.
8. *Charge as to the assessment of damages; when erroneous.*—In an action for malicious prosecution, an instruction to the jury that, if the prosecution was instituted maliciously and without probable cause, the jury might find for the plaintiff, and assess damages in such an amount as they determined the plaintiff was entitled to, without direction as to the elements of damages or the principles by which the jury's discretion should be governed, is erroneous and should not be given. *Marks v. Hastings*, 165.

DEBT AND DEBTOR.

1. *Promises to pay the debt of another.*—A promise of one person to pay a debt due from him to another, for a valuable consideration, enures to the benefit of the latter, if he elects to claim the benefit thereof; and he may sue in his own name to recover the amount so agreed to be paid. *North Ala. Dev. Co. v. Short*, 333.
2. *Application of a payment on a debt; right of creditor in absence of specific direction.*—A debtor may, at the time of payment, direct its application; but if, at the time of payment, he is indebted to the same creditor in two separate accounts, and fails to give any direction as to how the said payment shall be applied, the creditor has the right to apply it to either one of his debts; and when so applied, at the time of payment, both parties are

DEBT AND DEBTOR—*Continued.*

- bound by such application, which can not be changed except by mutual consent. *Kent & Barnett v. Marks & Gayle*, 350.
3. *Burden of proving specific direction.*—The burden of proving an alleged specific direction as to the application of a payment upon a debt to a creditor, is upon the debtor who affirms such special direction. *Ib.* 350.
 4. *Statute of frauds; promise to answer for debt, default or miscarriage of another*—When, at the instance of one person, goods are sold to another for his sole use and benefit, and any credit whatever is extended to the party to whom the consideration moves, the debt is that of the latter, and the other party's obligation is that of guarantor, which, under the statute (Code, § 173), to be binding must be in writing. *Webb v. Hawkins Lumber Co.*, 630.
 5. *Same.*—When in an action to recover for goods sold, it is shown that the defendant applied to the plaintiff to fill an order for another person, and said that he, the defendant, "would guarantee the bill and pay for it," and that thereupon the goods were shipped and the account was charged on the books of the plaintiff to the person for whom the goods were bought, and that the plaintiff looked for payment to both the defendant and the person for whom the goods were bought, the promise of the defendant was to answer for the debt, default or miscarriage of another (Code, § 173), and to be binding should have been in writing, expressing a consideration signed by him. *Ib.* 630.
 6. *Fraudulent conveyance; payment of a pre-existing debt*—A transfer in 1891 by a failing debtor of his stock of goods, at its fair market value, in payment of a valid, pre-existing debt, is not fraudulent, if the debt was absolute, and the property conveyed was received at its reasonably fair market value, and no benefit was secured to the debtor beyond a release from the debt. *Curran & Co. v. Olmstead & Scheuing*, 692.

DEEDS.

1. *Re-delivery of deed does not reinvest title in grantor.*—Upon the execution and delivery of a deed conveying land to the grantee, the title becomes vested in such grantee, and the redelivery of the deed and its mutilation or destruction by the parties can not reinvest the estate in the grantor, or estop the grantee from claiming title under it. *Whisenant v. Gordon*, 250.
2. *Conveyance of land; must be in writing.*—Conveyances of land must be in writing, and their execution must be accomplished by formalities, the observance of which is calculated to remove all doubt or uncertainty as to the grantor's intention to divest himself of the title to the land conveyed. *Ib.* 250.
3. *Possession by grantor after execution of deed.*—Where the owner of land has executed and delivered a deed thereto, but has never parted with his actual possession, his possession is not that of owner, but of a tenant of the grantee; and his possession can not become adverse to his grantee without an open and distinct disavowal, and the assertion of a hostile title, brought to the actual knowledge of the said grantee. *Yancey v. S. & W. R. R. Co.*, 234.
4. *Conveyance of right of way; adverse possession of grantor.*—If, after the execution of a conveyance of a right of way to a railroad company, in consideration of the road being built on and along the grantor's land, and upon condition that if the road is not built upon such right of way the deed was to be null and void, the company located, levelled and graded the road along this line, the title passed to the grantee, and it became actually

DEEDS—*Continued.*

- possessed of said right of way; and if, after the lapse of five years from the date of the conveyance, the grantor commenced to cultivate the land formerly conveyed, without the knowledge of the grantee, he did not thereby assert an adverse holding, nor was his cultivation such a re-entry as to originate a right to claim a possession adverse to his grantee. *Ib.* 234.
5. *Condition of deed of conveyance; ejectment can not be maintained after its fulfillment.*—Where the consideration for a conveyance of the right of way to a railroad company was that the road should be built on and along the lands of the grantor, and the deed was conditioned that it should be void if the road was not built on said right of way, the grantor can not declare the conveyance forfeited and maintain ejectment for the land, after the road was built thereon, although not completed until after the lapse of 13 years from the date of the conveyance; neither the charter nor deed fixing any time within which the road was to be built. *Ib.* 234.
 6. *Description of land in conveyance; no abatement of purchase price when void for uncertainty.*—Where a part of the land in a deed of conveyance is described as "a portion of the northwest quarter of the northwest quarter and a part of the southwest quarter of the northwest quarter of section 28, all in township 7, range 25," the deed is void as to such land, for uncertainty and indefiniteness in the description; and an abatement of the purchase price will not be allowed the purchaser for a deficiency in the number of acres in said section 28, since both parties must be presumed to have known that the deed conveyed no part of the lands lying in said section. *Dykes v. Bottoms*, 390.
 7. *Title to support ejectment; construction of deed for right of way.*—Plaintiff and his wife executed to the trustee of a railroad company about to be formed a deed of the right of way over plaintiff's land for a railroad "from M., Ala., by A., Ala., to C., Fla., or other points in southeast Ala. or Fla.," provided that the road should be built within three years from a certain date. The company was incorporated, and within three years built a road over a right of way granted in the deed, from M. by A. to L., a station south of M., and in the direction of C. Held, that L. was in "southeast Ala.," within the meaning of the deed, and hence plaintiff could not recover in ejectment against the company owning and operating the road. *Knight v. Ala. Mid. Railway Co.*, 407.
 8. *Conveyance absolute in terms; evidence necessary to declare it a mortgage.*—When parol evidence is relied upon to have a deed of conveyance of lands, absolute in its terms, declared a mortgage or security for a debt, or to have a resulting trust in lands declared, the evidence adduced must be clear and convincing. *Jordan v. Garner*, 411.
 9. *When deed absolute in form declared a mortgage.*—On a bill, filed for that purpose, a deed, absolute on its face, will be declared a mortgage, when it is shown that the complainant purchased the lands, and upon payment of three-fifths of the purchase price received from the vendor a bond for title, that defendant, under an agreement with complainant, advanced for him to the vendor the balance of the purchase money, for which amount, with agreed interest, complainant executed his note to defendant, which note was a continuing debt, that the vendor had no negotiation with the defendant for the sale of the land, but executed the deed to him by direction of complainant, in consideration of the payment by him for complainant of the balance due upon the land, which balance was greatly less than the true value of said land. *Hughes v. McKenzie*, 415.

DEEDS—Continued.

10. *Easement; indefinite description made certain by subsequent designation.*—When a deed granting an alley-way or other easement is indefinite in its description of the particular location of the way, but the grantor afterwards definitely locates the easement intended to be conveyed, after which the grantee entered into actual possession and enjoyment, and continued therein for a long time, such location and delivery of possession is a designation of the way conveyed by the deed, and the grantee's right thereto becomes as fixed and irrevocable as if the deed had accurately and definitely described such location. *Wharton v. Hannon*, 554.
11. *Bill to re-establish a lost deed; insufficient averments*—A bill filed to re-establish a lost deed, which, without verification, merely states that complainant caused the lot to be bought and paid for, that the legal title was conveyed, that the deed was not recorded, but, after delivery, was lost or destroyed in some way, unknown to complainant, but fails to show how, when or by whom it was lost, what it contained, what title or interest it conveyed, or what consideration, and by whom paid, contains insufficient averments to warrant the relief prayed for, and is demurrable. *Torrent Fire Engine Co. v. City of Mobile*, 559.
12. *Exception in deed of uncertain parts of the property conveyed does not avoid a conveyance.*—When in a conveyance, complete and perfect in itself, of lands well identified and described there is embodied an exception from the grant of an uncertain and undefinable part of the property conveyed, the exception is void for uncertainty, but the grant itself is good. *Morris & Co. v. Giddens*, 571.
13. *Same.*—An exception in a mortgage of "41 acres off of the north and west sides of the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 2, township 11, range 19," being itself undefinable, is void for uncertainty. *Ib.* 571.
14. *Recitals of deed as evidence of consideration.*—As against an antecedent judgment creditor, claiming as purchaser at a sheriff's sale under execution issued on his judgment, a recital in a deed from the judgment debtor to a third party is no evidence of the payment of a valuable consideration by the grantee therein, and, unaided by other evidence, is insufficient to sustain the conveyance against the purchasing creditor *Wells et al. v. Watson*, 628.

DEPOSITIONS.

1. *Objection to deposition; when too late.*—An objection to a deposition, which is not made before the trial is entered upon, and it is not shown that the ground of the objection transpired or became known to the party objecting only after the trial began, comes too late and is properly overruled. *Brooks v. Rogers*, 111.
2. *Objection to testimony because not responsive; when properly overruled.*—If a part of the testimony of a witness, as shown by her deposition, is not responsive to the cross interrogatory under which it was given, but was competent evidence in the cause, and was but the repetition of facts to which the witness had deposed in response to interrogatories in chief, an objection to such testimony is properly overruled. *Ib.* 111.
3. *Personal attendance by a woman as a witness compelled, although her deposition has been taken.*—The statute, (Code, § 2813), which provides that when the deposition of a witness, residing in the county in which the cause is pending, has been taken, if affidavit be made that the personal attendance of the witness is believed to be necessary, then such attendance shall be re-

DEPOSITIONS—*Continued.*

quired, is applicable to and includes women whose depositions have been taken, as authorized by section 2801 of the Code *Ex parte Jenks*, 429.

DESCRIPTION OF PROPERTY.

1. *Description of land in conveyance; no abatement of purchase price when void for uncertainty.*—Where a part of the land in a deed of conveyance is described as "a portion of the northwest quarter of the northwest quarter and a part of the southwest quarter of the northwest quarter of section 28, all in township 7, range 25," the deed is void as to such land for uncertainty and indefiniteness in the description; and an abatement of the purchase price will not be allowed the purchaser for a deficiency in the number of acres in said section 28, since both parties must be presumed to have known that the deed conveyed no part of the lands lying in said section *Dykes v. Bottoms*, 390.
2. *Easement; indefinite description made certain by subsequent designation.*—When a deed granting an alley-way or other easement is indefinite in its description of the particular location of the way, but the grantor afterwards definitely locates the easement intended to be conveyed, after which the grantee entered into actual possession and enjoyment, and continued therein for a long time, such location and delivery of possession is a designation of the way conveyed by the deed, and the grantee's right there-to becomes as fixed and irrevocable as if the deed had accurately and definitely described such location. *Wharton v. Hannon*, 554.
3. *Ejectment; fatal variance between complaint and evidence in description of land.*—When in an action of ejectment the plaintiff sues in his complaint to recover "41 acres of land off of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 2, township 11, range 19;" and the proof shows that on the trial the plaintiff asserted title to "41 acres off of the north and west sides of the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 2, township 11, range 19," there is a fatal variance between the averment and proof, which precludes a recovery by the plaintiff. *Morris & Co. v. Giddens*, 571.
4. *Exception in deed of uncertain parts of the property conveyed does not avoid a conveyance.*—When in a conveyance, complete and perfect in itself, of lands well identified and described there is embodied an exception from the grant of an uncertain and undefinable part of the property conveyed, the exception is void for uncertainty, but the grant itself is good. *Ib.* 571.
5. *Same.*—An exception in a mortgage of "41 acres off of the north and west sides of the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 2, township 11, range 19," being itself undefinable, is void for uncertainty. *Ib.* 571.

DETINUE.

1. *Action of detinue; want of consideration of mortgage as a defense.* Where the plaintiffs' title in a detinue suit depends upon a mortgage, the defendant mortgagor may, under the provisions of section 2720 of the Code, as amended by act approved February 21, 1893, (Acts 1892-93, p. 1127), defend on the ground of the want or failure of consideration for the mortgage. *Lewis v. Simon & Co.*, 546.
2. *Pleadings; want of consideration, and not fraud in execution of the note.*—A plea alleging that the defendant executed the note and mortgage on the representation by their agent that plaintiffs would lend him a certain sum of money, which they failed to

DETINUE—*Continued.*

do, does not show fraud in the execution of the note and mortgage, but the want of consideration therefor. *Ib.* 546.

3. *Charge to jury.*—When issue is joined on a plea of the failure of consideration, and the defendant testifies that the note and mortgage, which formed the basis of the claim to the property sued for, were executed upon a promise by the plaintiff's agent that they would lend defendant a certain sum, that plaintiffs had refused to make the loan, and that defendant had received nothing in consideration of the note and mortgage, it is error to refuse a charge asked by the defendant which asserts, "If the promise was in fact made by plaintiffs, through their agent, to let defendant have five hundred dollars in money on the mortgage and note, then plaintiffs can not recover." *Ib.* 546.

DEVISE.

1. *Defeasible estate; conditional fee.*—Where a testator gives to his grand-son certain property, with the condition that if the grand-son should die leaving no legitimate issue at his death, then the property should go to another named devisee, the grand-son takes a conditional fee, defeasible on his dying without issue; and, on his death without issue, the latter devisee, the contingent remainderman, becomes entitled to the property devised, for the recovery of which he may maintain an action of ejectment. *Newsom v. Holesapple*, 682.

DOMESTIC ANIMALS.

1. *Duty of owner or keeper of ferocious animal; liability for injury inflicted by it.*—The owner or keeper of a vicious and ferocious domestic animal, having knowledge of its vicious and ferocious nature and habits, must safely and securely keep such animal, and his failure to do so imposes liability for injury inflicted thereby. *Strouse v. Leipf*, 433.
2. *Action against wife for injuries caused by a dog owned by her.*—Where a dog, which is owned by a married woman, and known to be ferocious and vicious, is kept on the premises owned by her, where she and her husband reside, and escaping therefrom inflicts injuries, the wrongful act is the keeping of the dog, and the husband, being the head of the family and having control of the premises, is liable for such injuries, and no action therefor can be maintained against the wife. (McCLELLAN, J. dissenting.)

DUMMY RAILROADS. See RAILROADS, SUB-TITLE

EASEMENTS.

1. *Conveyance of right of way; adverse possession of grantor.*—If, after the execution of a conveyance of a right of way to a railroad company, in consideration of the road being built on and along the grantor's land, and upon condition that if the road is not built upon such right of way the deed was to be null and void, the company located, levelled and graded the road along this line, the title passed to the grantee, and it became actually possessed of said right of way; and if, after the lapse of five years from the date of the conveyance, the grantor commenced to cultivate the land formerly conveyed, without the knowledge of the grantee, he did not thereby assert an adverse holding, nor was his cultivation such a re-entry as to originate a right to claim a possession adverse to his grantee. *Yancey v. S. & W. R. R. Co.*, 234.

EASEMENTS—Continued.

2. *Title to support ejectment; construction of deed for right of way.*—Plaintiff and his wife executed to the trustee of a railroad company about to be formed a deed of the right of way over plaintiff's land for a railroad "from M., Ala., by A., Ala., to C., Fla., or other points in southeast Ala. or Fla.," provided that the road should be built within three years from a certain date. The company was incorporated, and within three years built a road over a right of way granted in the deed, from M., by A. to L., a station south of M., and in the direction of C. Held, that L. was in "southeast Ala.," within the meaning of the deed, and hence plaintiff could not recover in ejectment against the company owning and operating the road. *Knight v. Ala. Mid. Railway Co.*, 407.
3. *Easement; indefinite description made certain by subsequent designation.*—When a deed granting an alley-way or other easement is indefinite in its description of the particular location of the way, but the grantor afterwards definitely locates the easement intended to be conveyed, after which the grantee entered into actual possession and enjoyment, and continued therein for a long time, such location and delivery of possession is a designation of the way conveyed by the deed, and the grantee's right thereto becomes as fixed and irrevocable as if the deed had accurately and definitely described such location. *Wharton v. Hannon*, 554.
4. *Bill in equity to enjoin obstruction of alley-way; evidence.*—Where, on a bill filed to enjoin the obstruction of an alley-way it is shown that the description in the deed granting the said way from the defendant to the complainant was indefinite, but that after the grant the way was definitely located by the defendant, and was used by the complainant, evidence of oral statements made by the parties prior to the execution of the deed, indicating a purpose on the part of the grantor to acquire at some future time other adjacent lands, and locate a way different from that which was located, is incompetent. *Ib.* 554.
5. *Enjoining obstruction of alley-way; jurisdiction of equity.*—Where a deed granting an alley-way does not definitely describe the location thereof, but the way is designated by the grantor and is accepted and used by the grantee, and the said grantor afterwards obstructs the way thus designated and used, a court of equity, upon proper bill filed, will enjoin such obstruction, notwithstanding a better alley-way has been opened by the grantor and offered to the grantee, and although the use of the obstructed alley-way involves the crossing with teams, &c., of a sidewalk on a much used street in a city. (STONE, C.J. dissenting, holds that, in the absence of the averment, that the grantor was insolvent, and of facts showing that complainant could not obtain ample redress in an action at law, and in view of the fact that another and better way was tendered, the granting of an injunction is discretionary, and complainant in this case should be left to his action at law.) *Ib.* 554.
6. *Same.*—In such a bill, filed to enjoin the obstruction of an alley-way by the grantor, there should be averments that the location of the alley-way was made, and a description of the way so located; proof of location without averment is not sufficient to warrant relief. *Ib.* 554.

EJECTMENT.

1. *Judgment; when insufficient to support an appeal.*—The statement in a judgment entry in an action of ejectment, just after the recital of the verdict, "and judgment is rendered against defendants,

EJECTMENT—*Continued.*

- for the land sued for, together with all the costs in this behalf, for which execution may issue," is not such a judgment as will support an appeal; and when the transcript contains no other judgment entry, the appeal will be dismissed. *Bell v. Otts*, 186.
2. *Condition of deed of conveyance; ejectment can not be maintained after its fulfilment.*—Where the consideration for a conveyance of the right of way to a railroad company was that the road should be built on and along the lands of the grantor, and the deed was conditioned that it should be void if the road was not built on said right of way, the grantor can not declare the conveyance forfeited and maintain ejectment for the land after the road was built thereon, although not completed until after the lapse of 13 years from the date of the conveyance; neither the charter nor deed fixing any time within which the road was to be built. *Yancey v. S. & W. R. R. Co.*, 234.
 3. *Proceedings to set apart homestead; objections can not be raised on collateral attack.*—In an action of ejectment, involving the widow's title to the homestead, an objection that the record of the proceedings to set apart the homestead to the widow did not show affirmatively that the commissioners appointed were "citizens of good standing," cannot be raised. *Smith et al. v. Boutwell et al.*, 373.
 4. *Title to support ejectment; construction of deed for right of way.*—Plaintiff and his wife executed to the trustee of a railroad company about to be formed a deed of the right of way over plaintiff's land for a railroad "from M., Ala., by A., Ala., to C., Fla., or other points in southeast Ala. or Fla.," provided that the road should be built within three years from a certain date. The company was incorporated, and within three years built a road over a right of way granted in the deed, from M. by A. to L., a station south of M., and in the direction of C. Held, that L. was in "southeast Ala.," within the meaning of the deed, and hence plaintiff could not recover in ejectment against the company owning and operating the road. *Knight v. Ala. Mid. Railway Co.*, 407.
 5. *Ejectment; fatal variance between the complaint and evidence in description of land.*—When in an action of ejectment the plaintiff sues in his complaint to recover "41 acres of land off of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 2, township 11, range 19;" and the proof shows that on the trial the plaintiff asserted title to "41 acres off of the north and west sides of the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 2, township 11, range 19," there is a fatal variance between the averment and proof, which precludes a recovery by the plaintiff. *Morris & Co. v. Giddens*, 571.

ELECTIONS—See CONTEST OF ELECTIONS.

ERROR.

1. *Rulings upon the evidence; error without injury.*—Where competent evidence, which has been erroneously excluded, is afterwards introduced on renewed inquiry, the error of its former exclusion is cured, and becomes error without injury. *Tenn. River Transp. Co. v. Kavanaugh Bros.*, 1.
2. *Error without injury; rulings on pleadings.*—The sustaining of a demurrer to a special plea, even if erroneous, is not ground for reversal, when the record shows that the defendant had the full benefit of the same defenses under other pleas. *Russell v. Jones*, 261. *A. G. S. R. R. Co. v. Dobbs*, 219.
3. *Limitation of appeal; when assignments of error are stricken out.*—Where an appeal is sued out in a chancery cause more than a

ERROR—Continued.

- year after the rendition of a decree which settled all the equities between the parties, such decree can not be reviewed, and all the assignments of error relating to matters embraced in that decree should be stricken out, upon motion, because the appeal was barred at the time it was taken. *Foley v. Lera*, 395.
4. *Pleading; error without injury*.—Where a defendant, under a plea of the general issue, is entitled to make the same defense that could have been made under a special plea to which a demurrer was sustained, and on the trial evidence was introduced before the jury, and the identical question sought to be presented by the special plea was considered, error in sustaining the demurrer is error without injury. *Strouse v. Leipf*, 433.

See APPEALS.

ESTOPPEL.

1. *Estoppel by contract with a corporation*.—One who contracts with a corporation having a *de facto* existence, and the reputation of a legal corporation, having a *de facto* existence, and the reputation of a legal corporation in the actual exercise of corporate powers and franchises, is estopped from denying the legality of the existence of the corporation, or inquiring into the irregularities attending its formation to defeat a contract, or to avoid the liability he voluntarily and deliberately incurred; and especially is this true as to stockholders seeking to avoid a liability to creditors of a corporation. *Bibb v. Hall*, 79.
2. *Action on replevy bond; plaintiff estopped*.—In an action on a replevy bond, if it is shown that the plaintiff, with knowledge thereof, received property in lieu of that for which he sued in the detinue suit, and for which defendants gave the replevy bond, and, after being informed of the substitution, retained the substituted property, exercising acts of ownership over it, he is estopped from claiming a forfeiture of the bond for the non-delivery of the property originally sued for. *Heard v. Hicks*, 102.
3. *Same; co-tenant not estopped thereby from asserting equities against existing mortgage*.—When there exists a mortgage on joint property to secure a debt of one of the co-tenants, a partition of the common property by decree of the probate court does not estop the other co-tenants from asserting their equity to have the share allotted to their joint owner sold first to pay such debt, in exoneration of the shares allotted to them. *Austin v. Bean*, 133.
4. *Same; co-tenant not estopped from asserting equity by exchange of her share by warranty deed*.—The fact that one of the joint owners of common property, immediately after the partition of said lands by decree of the probate court, conveyed the share allotted to her by warranty deed, in exchange for the share of one of her co-tenants, does not estop her from the assertion of her equity to have the share so exchanged sold first, to satisfy a mortgage existing upon the whole property, given to secure a debt of her said co-tenant, the mortgage having been executed prior to the acquisition of title by the co-tenants. *Ib.* 133.
5. *Re-delivery of deed does not reinvest title in grantor*.—Upon the execution and delivery of a deed conveying land to the grantee, the title becomes vested in such grantee, and the re-delivery of the deed and its mutilation or destruction by the parties can not reinvest the estate in the grantor, or estop the grantee from claiming title under it. *Whisenant v. Gordon*, 250.
6. *Municipal corporation bound by acts of its agent or employé; when*

ESTOPPEL—Continued.

estopped from denying the legality of his appointment.—Where one has served a municipal corporation in the capacity of superintendent of certain work carried on by said city, and the municipal authorities have accepted such service and received the benefit of his skill and labor, the municipal corporation can not avoid its responsibility for injuries resulting from his negligence in the doing of work within the scope of the service he was rendering, by denying the legality of his appointment. *City Council of Sheffield v. Harris, 564.*

EVIDENCE.**I. ADMISSIBILITY AND RELEVANCY.**

1. *Evidence of agency.*—In an action against a corporation founded upon a contract alleged to have been made with the defendant's agent, it is competent to prove, as tending to show the existence of the agency, that the alleged agent had made contracts with other persons as such agent, which were ratified by the defendant corporation. *Tenn. River Transportation Co. v. Kavanaugh Bros., 1.*
2. *When an appellate court reviews an action of the trial court upon the admissibility of evidence.*—To justify a review by the appellate court of a ruling by the trial court upon the admissibility of evidence, the record must show affirmatively that the trial court made a ruling, which was excepted to at the time, or that counsel called attention to the question and requested a ruling upon it, which the trial court failed or refused to make, and that counsel making the request then and there reserved an exception to the court's failure or refusal to make such ruling. *Ib. 1.*
3. *Sale of property; evidence of acts of ownership.*—In an action to recover the price of property alleged to have been sold to the defendant, evidence of any acts of ownership or control over the said property by the plaintiffs, subsequent to the sale counted upon, is admissible as tending to disprove the alleged sale. *Ib. 1.*
4. *Rulings upon the evidence; error without injury.*—Where competent evidence, which has been erroneously excluded, is afterwards introduced on renewed inquiry, the error of its former exclusion is cured, and becomes error without injury. *Ib. 1.*
5. *Agent of corporation at a particular place; irrelevant testimony.*—In an action against a corporation, founded upon a contract made with the defendant's agent, the question at issue being whether the person with whom the plaintiffs dealt was, in fact, the defendant's agent at a certain place, evidence that he transacted business for the corporation at another place sheds no light upon the inquiry, and is irrelevant. *Ib. 1.*
6. *Admissions of agent against his principal; admissibility as a predicate for impeachment.*—Although in an action against a corporation, founded upon a contract alleged to have been made with the defendant's agent, an admission made by such agent is not competent evidence against his principal, unless that admission was made in company with, and at the time of the act of agency which it was intended to explain; still the question which calls for such evidence may be admissible for the purpose of laying a predicate for the introduction of impeaching testimony. *Ib. 1.*
7. *Impeachment of party's own witness; right to refresh his memory.*—A party can not impeach his own witness by showing that he is unworthy of belief, or by proving that he has made contradictory statements, but he may refresh his memory in a proper way; and it is not error for the court to permit the plaintiff to

EVIDENCE—Continued.

- ask his witness, for the purpose of refreshing his memory, if he did not testify differently on a former trial. *L. & N. R. R. Co. v. Hurt*, 34.
8. *American mortality tables as evidence.*—In an action against a railroad company by an employé, to recover damages for personal injuries, the American tables of mortality are admissible to show plaintiff's expectancy of life. *Ib.* 34.
 9. *Evidence of reckless, wanton or willful negligence can be introduced in a complaint which avers simple negligence.*—Evidence of reckless, wanton or willful negligence can be introduced on the trial of a cause in which the complaint avers only simple negligence; and whether the evidence thus introduced was sufficient to authorize the plaintiff to recover, notwithstanding he may have been guilty of contributory negligence, is a question for the jury. *Ib.* 34.
 10. *Contradictory statements by party to suit.*—Admissions, which are relevant and material to the issue, made by a party to the suit are always admissible against him; and when the party testifies on a subsequent trial differently from what he did on a former trial, it is competent for the adverse party to give in evidence his statement on the former trial, and it is the duty of the jury to consider both statements in connection with the explanation, if any is made, in the light of all the evidence, to determine which is true. *Ib.* 34.
 11. *Action on replevy bond; plaintiff entitled to compensation for damage to property injured; evidence of damage admissible.*—When, after the execution of a replevy bond by the defendants in an action of detinue, and pending the suit, a portion of the property replevied is damaged, but not wholly destroyed, by fire, the plaintiff is entitled to compensation for the injury to the property, and evidence tending to show the amount of damage is competent and relevant. *Heard v. Hicks*, 102.
 12. *A claim of forfeiture by landlord and a denial of forfeiture by tenant do not show adverse holding; exclusion of such evidence not error.*—The facts that the landlord claimed a forfeiture of the lands because of the wrongful severance by the tenant of timber from the leased premises, and that the tenant denied the forfeiture, and put the landlord to an action of ejectment to recover the land before the lease expired, which action was pending and being resisted by the tenant when the landlord brought an action of trover against the said tenant to recover for the conversion of timber wrongfully severed, do not tend to show that the tenant held the land adversely to the landlord; and the exclusion of such evidence in the action of trover is not erroneous, and affords no ground of complaint to the defendant therein. *Brooks v. Rogers*, 111.
 13. *The lease competent evidence in an action of trover by landlord against tenant.*—In an action of trover by the landlord against his tenant, pending the lease, for the conversion of timber wrongfully cut from the demised premises, it is competent for the landlord to introduce in evidence the lease that was current at the time such suit was brought, as showing that the defendant's possession was not adverse to the plaintiff. *Ib.* 111.
 14. *Same.*—The fact that part of the lease so introduced in evidence might be looked to by the jury to determine what were the stipulations of a previous lease between the same parties in a certain particular, furnishes no ground for the exclusion of the lease, or the part specially objected to; and the fact that the provision singled out tends to contradict the oral testimony of defendant, of itself, makes the overruling of the motion correct. *Ib.* 111.

EVIDENCE—*Continued.*

15. *Evidence; proof of handwriting in a note*—In an action by a bank on a note dated on Sunday, payable to the bank, testimony that the body of the note sued on was in the handwriting of the bank's cashier, who was not in its employ until after the date of the note, is admissible as tending to prove that the note did not bear its true date. *Hauerwas v. Goodloe*, 162.
16. *Same; admissibility of bank book*—In an action by a bank on a note dated on Sunday, a book of the bank in which the number, name of the maker, date of execution, amount and date of maturity of all notes discounted by the bank are kept, is not admissible in evidence to show that the note sued on was a renewal of another note, which matured on Sunday, and that the renewal note was executed on a day that was not Sunday, but was dated back to the maturity of the old note according to the custom of the bank. *Ib* 162.
17. *Admissibility of secondary evidence of contents of affidavit and warrant of arrest*.—When there is evidence that, after an arrest was made, the sheriff enclosed the affidavit and warrant in an envelope, which he sealed, addressed and mailed, secondary evidence of the contents of such affidavit and warrant is admissible, although it was not shown to whom the envelope was addressed, and although the magistrate before whom the affidavit was made, by whom the warrant was issued, testified that he had been unable to find them after making diligent search in his office, and he had never received them from the sheriff; it being the sheriff's duty to deliver the papers to the magistrate issuing them and to whom they were returnable, it will be presumed, in absence of evidence to the contrary, that he performed his duty and addressed the envelope to the proper officer. *Marks & Co. v. Hastings*, 165.
18. *Evidence; admissibility of telegrams, and of statements by the defendant*.—In an action for malicious prosecution, telegrams by plaintiff's employers to defendant, to induce him to abandon the prosecution, and declarations by defendant on being shown the telegrams, that he would not withdraw the criminal proceedings, that he wanted the warrant executed, that plaintiff was a thief, and he would not dismiss the prosecution, are admissible as tending to show the zeal and motive of the defendant in the prosecution. *Ib* 165.
19. *Irrelevant evidence; number of persons present when plaintiff arrested*.—In an action for malicious prosecution, evidence as to the number of persons present when the officer went to arrest the plaintiff is irrelevant and inadmissible, the defendant not being responsible for any abuse in the manner of making the arrest, which was not directed by, participated in, or subsequently approved by him. *Ib* 165.
20. *Evidence as to value of goods in claim suit*—In a statutory claim suit, where the sale of goods by an insolvent debtor to the claimant, in payment of an alleged indebtedness, is assailed on the ground of undervaluation, the amount the claimant received for such goods at a private sale subsequently made to third parties, is not legal evidence against the attacking creditor of the value of the goods; and questions seeking to elicit such evidence should not be allowed. *Claflin & Co. v. Rodenberg*, 213.
21. *Conveyance attacked as fraudulent; relevant evidence*.—On an issue formed questioning the bona fides of a transfer of property, in payment of an alleged indebtedness, if the debt is established as real, the pivotal question is whether there was such disparity between the value of the property transferred and the amount of the debt as to be indicative of fraud; and in determining

EVIDENCE—(continued).

- this question, the evidence of the market value of the transferred property is relevant and admissible. *Bates v. Morris*, 282.
22. *Written affidavit inadmissible without proof of its execution.*—An affidavit containing admissions made by a decedent is not admissible as evidence on the final settlement of his estate, without proof of its execution by the deceased; and the fact that the affidavit bears the certificate of a notary public of subscription and verification, is not efficacious to make the writing self-proving. *Keyland v. Keyland*, 297.
23. *Custom and usage; irrelevant evidence.*—In an action on a verified account, when it is shown that the account sued on had been paid to plaintiffs' travelling salesman, who sold the goods by sample, but had no authority to receive payment therefor, evidence that in a town where the sale was made it was a custom among the merchants to pay the travelling salesman for goods purchased, is not competent in the absence of other evidence tending to show that the principal had notice of such custom. *Simon & Son v. Johnson*, 368.
24. *Custom and usage; admissibility of evidence thereof.*—Evidence of custom and usage is not admissible to explain or extend the meaning of a written contract unless the terms of such written contract are ambiguous and uncertain. *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 446.
25. *Evidence of custom and usage.*—Where a contract of sale specifies the price of the article sold, "f. o. b. cars" at a certain place of destination, named in the contract, parol evidence of the custom and usage as to the payment of freight on the particular article sold, which would give to the terms a different meaning or operation than would have attached had the words of which they are the initials been originally inserted in the contract, is inadmissible; in such a contract the price stipulated is for the articles free on board the cars at the place of destination, and does not impose upon the buyer the duty of paying the freight thereon. *Ib.* 446.
26. *Action against railroad company; relevant evidence.*—In an action for injuries to a railroad employé caused by the train on which he was employed running through an open switch, where there was evidence that locks had been used on defendant's switches for six months, and other evidence that a lock had never been put on the switch in question, the evidence of a witness that he was employed by defendant up to two months before the accident, and that there were then no locks in use on the road, is relevant and admissible. *Birmingham R. & E. Co. v. Baylor*, 488.
27. *Same; conclusion of witness.*—In an action for injuries arising from a train running through an open switch, the engineer of the train which had been the last to pass through the switch previous to the accident, can not testify that the switch was secure when he passed through it, without first stating its condition and how it was secured. *Ib.* 488.
28. *Bill in equity to enjoin obstruction of alley-way; evidence.*—Where, on a bill filed to enjoin the obstruction of an alley-way it is shown that the description in the deed granting the said way from the defendant to the complainant was indefinite, but that after the grant the way was definitely located by the defendant, and was used by the complainant, evidence of oral statements made by the parties prior to the execution of the deed, indicating a purpose on the part of the grantor to acquire at some future time other adjacent lands, and locate a way different from that which was located, is incompetent. *Wharton v. Han-non*, 554.
29. *Evidence; transcript of will.*—Where a will has been duly probated,

EVIDENCE—*Continued.*

a transcript of it from the records of the probate court, together with the proof of probate and the order of the court, properly certified, is, under the statute (Code, § 1984), admissible in evidence to the same extent as if the original will was produced; and the fact that such transcript was made out for and used in another case, does not render it less admissible in evidence. *Newsom v. Holesapple*, 682.

II. ADMISSIONS.

30. *Contradictory statements by party to suit.*—Admissions, which are relevant and material to the issue, made by a party to the suit are always admissible against him; and when the party testifies on a subsequent trial differently from what he did on a former trial, it is competent for the adverse party to give in evidence his statement on the former trial, and it is the duty of the jury to consider both statements in connection with the explanation, if any is made, in the light of all the evidence, to determine which is true. *L. & N. R. R. Co. v. Hurt*, 34.
31. *Declarations against the interest of claimant; when incompetent.*—In a statutory claim suit, evidence of declarations made by the grantor of the claimant against the interest of the latter, when he was not present to deny or explain them, is incompetent, and its admission is error. *Claffin v. Rodenberg*, 213.

III. BURDEN OF PROOF.

32. *Burden of proof as to release of cause of action.*—In an action of trover by the landlord against the tenant for the conversion of wood wrongfully cut from the rented premises, where the tenant claims that the landlord had released the cause of action, the burden of proving such release is upon the tenant. *Brooks v. Rogers*, 111.
33. *Action on a note; burden of proving its true date.*—In an action on a note dated on Sunday, the presumption is that the note bears its true date, and the burden is upon the plaintiff to overcome such presumption, by proving that it was executed on a day that was not Sunday. *Hauerwas v. Goodloe*, 162.
34. *Sale of lands for distribution; burden of proof.*—Land can not be sold for distribution except upon satisfactory proof that it can not be partitioned without the sale; and the burden rests upon the petitioner to make this proof. *Mitchell v. Mitchell*, 183.
35. *Burden of proving specific direction.*—The burden of proving an alleged specific direction as to the application of a payment upon a debt to a creditor, is upon the debtor who affirms such special direction. *Kent & Barrett v. Marks & Gayle*, 350.

IV. MATTERS JUDICIALLY KNOWN.

36. *"f. o. b"; judicial knowledge.*—Courts judicially know that "f. o. b." in contracts of sale, where the property sold is to be transported, mean, "free on board" the cars at a certain place named in the contract. *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 446.

V. OBJECTIONS.

37. *Objection to depositions; when too late.*—An objection to a deposition, which is not made before the trial is entered upon, and it is not shown that the ground of the objection transpired or became known to the party objecting only after the trial began, comes too late and is properly overruled. *Brooks v. Rogers*, 111.

EVIDENCE—*Continued.*

38. *Objection to testimony because not responsive; when properly overruled.*—If a part of the testimony of a witness, as shown by her deposition, is not responsive to the cross interrogatory under which it was given, but was competent evidence in the cause, and was but the repetition of facts to which the witness had deposed in response to interrogatories in chief, an objection to such testimony is properly overruled. *Ib.* 111.
39. *General objection to evidence.*—When there are only general objections to evidence, without specifying the particulars in which it is objectionable, such objections are properly overruled, unless the evidence is plainly illegal or irrelevant. *Bates v. Morris*, 282.

VI. PAROL AND WRITTEN.

40. *The lease competent evidence in an action of trover by landlord against tenant.*—In an action of trover by the landlord against his tenant, pending the lease, for the conversion of timber wrongfully cut from the demised premises, it is competent for the landlord to introduce in evidence the lease that was current at the time such suit was brought, as showing that the defendant's possession was not adverse to the plaintiff. *Brooks v. Rogers*, 111.
41. *Same.*—The fact that part of the lease so introduced in evidence might be looked to by the jury to determine what were the stipulations of a previous lease between the same parties in a certain particular, furnishes no ground for the exclusion of the lease, or the part specially objected to; and the fact that the provision singled out tends to contradict the oral testimony of defendant, of itself, makes the overruling of the motion correct. *Ib.* 111.
42. *Written affidavit inadmissible without proof of its execution.*—An affidavit containing admissions made by a decedent is not admissible as evidence on the final settlement of his estate, without proof of its execution by the deceased; and the fact that the affidavit bears the certificate of a notary public of subscription and verification, is not efficacious to make the writing self-proving. *Keyland v. Keyland*, 297.
43. *Recitals of deed as evidence of consideration.*—As against an antecedent judgment creditor, claiming as purchaser at a sheriff's sale under execution issued on his judgment, a recital in a deed from the judgment debtor to a third party is no evidence of the payment of a valuable consideration by the grantee therein, and, unaided by other evidence, is insufficient to sustain the conveyance against the purchasing creditor. *Wells et al. v. Watson*, 628.
44. *Evidence; transcript of will.*—Where a will has been duly probated, a transcript of it from the records of the probate court, together with the proof of probate and the order of the court, properly certified, is, under the statute (Code, § 1984), admissible in evidence to the same extent as if the original will was produced; and the fact that such transcript was made out for and used in another case, does not render it less admissible in evidence. *Newsom v. Holesapple*, 682.

VII. PRIMARY AND SECONDARY.

45. *Evidence; proof of handwriting in a note.*—In an action by a bank on a note dated on Sunday, payable to the bank, testimony that the body of the note sued on was in the handwriting of the bank's cashier, who was not in its employ until after the date of the note, is admissible as tending to prove that the note did not bear its true date. *Hawcras v. Goodloe*, 162.
46. *Same; admissibility of bank book.*—In an action by a bank on a

EVIDENCE—*Continued.*

note dated on Sunday, a book of the bank in which the number, name of the maker, date of execution, amount and date of maturity of all notes discounted by the bank are kept, is not admissible in evidence to show that the note sued on was a renewal of another note, which matured on Sunday, and that the renewal note was executed on a day that was not Sunday, but was dated back to the maturity of the old note according to the custom of the bank. *Ib.* 162.

47. *Admissibility of secondary evidence of contents of affidavit and warrant of arrest.*—When there is evidence that, after an arrest was made, the sheriff enclosed the affidavit and warrant in an envelope, which he sealed, addressed and mailed, secondary evidence of the contents of such affidavit and warrant is admissible, although it was not shown to whom the envelope was addressed, and although the magistrate before whom the affidavit was made and by whom the warrant was issued, testified that he had been unable to find them after making diligent search in his office, and he had never received them from the sheriff; it being the sheriff's duty to deliver the papers to the magistrate issuing them and to whom they were returnable, it will be presumed, in absence of evidence to the contrary, that he performed his duty and addressed the envelope to the proper officer. *Marks & Co. v. Hastings*, 165.

VIII. WEIGHT AND SUFFICIENCY.

48. *Conveyance absolute in terms; evidence necessary to declare it a mortgage.*—When parol evidence is relied upon to have a deed of conveyance of lands, absolute in its terms, declared a mortgage or security for a debt, or to have a resulting trust in lands declared, the evidence adduced must be clear and convincing. *Jordan et al. v. McKenzie*, 411.
49. *Bill to enforce trust; when evidence insufficient to authorize relief.*—In a bill filed to establish a trust in land, the complainants claimed that they purchased the lands under a parol agreement; that defendant loaned them money to make the cash payment, and became security for deferred payments; that title was taken in defendant's name to secure him, he agreeing to convey the lands to complainants on repayment by them of his loan, and the balance of the purchase price. The only evidence to establish these facts was the testimony of one of the complainants, and of persons who derived their information from him. The testimony of the defendant, of the vendor, and of the person who took the acknowledgment sustained the claim of defendant, that he made the purchase for himself, that he made the cash payment and paid at maturity his note, executed for the deferred payment; and that he verbally promised to sell the land to the complainants, who had been unable to purchase it; and that complainants knew of the sale of part of the land by defendant, and witnessed valuable improvements thereon, but raised no objection or claim. *Held*, that the complainants were not entitled to the relief prayed, and that the bill was properly dismissed. *Ib.* 441.
50. *Plea of set-off; when not sustained by evidence.*—When, in an action on a note, there is interposed a plea of set-off, founded upon damages claimed by reason of plaintiff's failure to deliver certain goods as agreed upon when the note sued on was executed, but the defendant does not introduce evidence of the difference between the contract price of the goods and their value at the time and place of their delivery, and thereby fails to furnish a basis for ascertainment of the damages claimed, the plea of set-off is not sustained, and judgment should be rendered for plaintiff on such plea. *Howell & Clark v. Lehman & Son*, 625.

EXECUTIONS.

1. *Title acquired by purchaser at execution sale.*—F., after the execution of a mortgage to M., which was still unsatisfied, sold the land conveyed therein to W. After the agreement of sale, but before the conveyance by deed, judgment was recovered in the United States Circuit Court against F. After F. had conveyed the lands to W. by deed, the United States marshal sold the same lands under an execution issued upon the judgment recovered against F., and at this sale T. became the purchaser. *Held*, that W. and T. are both equitable claimants, and that the equity of W., being the older, is superior to that of T., conveyed by the marshal's deed. *Troy et al. v. May, 401.*
2. *Right of purchaser at an execution sale.*—When, before the mortgage debt is paid, the mortgagor agrees to sell to a third person the lands conveyed in said mortgage, and after this agreement a judgment is recovered against the said mortgagor, and execution thereunder is levied upon the same lands, and the said lands are sold under this execution, after the execution of the deed in compliance with the agreement of sale, the purchaser at said execution sale acquires the equity of redemption, and as the holder of such equity, is entitled to the excess of the balance due the mortgagor paid by the one who purchases at a subsequent sale under the mortgage. *Ib. 401.*

EXECUTORS AND ADMINISTRATORS.

1. *Statute of non-claim; operation against claim for devastavit.*—On the death of an administrator, not having made a final settlement of his trust, and being indebted to the estate for the loss or destruction of property intrusted to him, his devastavit constitutes such a breach of his administration bond as to make it an accrued claim against his sureties thereon, and the running of the statute of non-claim is, at once, put into operation. *Page v. Bartlett, 193.*
2. *Same; presentment.*—The presentment of a claim, as contemplated by the statute of non-claim (Code, § 081), can only be made by a party interested in the claim; and the nature and amount of the claim must be brought to the attention of the personal representative. *Ib. 193.*
3. *Same; presentment by filing bill in equity.*—A bill to enforce a claim against personal representatives of deceased sureties on an administration bond, which alleges that the claim was presented to the defendants by the filing of a bill against them by a certain named person, whose interest in the claim was not shown, and the nature and amount of the claim was not disclosed by the bill so filed, does not show such a presentment of the claim as is required by the statute of non-claim; such averment of presentment being merely a conclusion of the pleader. *Ib. 193.*
4. *Bill to enforce claim for devastavit; multifariousness.*—A bill to enforce a claim for devastavit against personal representatives of some of the sureties on an administrator's bond, and for a settlement of the estate, and also to enforce against the personal representatives of the other sureties, in their individual capacities, the personal penalty for failure to give the notice to creditors required by law, is multifarious. *Ib. 193.*
5. *Same; demurrer for want of parties.*—A bill against the personal representatives of the sureties of an administrator's bond for a settlement of the estate and to enforce a claim for devastavit, which avers that one of the heirs of the decedent is dead, and that her estate is entitled to whatever amount she would receive if living, but which makes neither her personal representative nor her heirs parties, and does not aver that there is

EXECUTORS AND ADMINISTRATORS—*Continued.*

- no administrator or executor of her estate, or children surviving her, is demurrable for want of proper parties. *Ib.* 193.
6. *Same; appointment of administrator ad litem.*—Such a bill does not make a case for the appointment of an administrator *ad litem* under the statute (Code, § 2283), which provides that when, in any proceeding in the probate or chancery court, the estate of a deceased person must be represented, and there is no executor or administrator of such estate, it shall be the duty of the court to appoint an administrator *ad litem* whenever the facts rendering the appointment necessary shall appear in the record, or shall be made known by affidavit. *Ib.* 193.
 7. *Petition for sale of lands to pay decedent's debts; sufficient averments.* A petition by an administrator for an order to sell lands belonging to the estate of his intestate for the payment of his debts (Code, §§ 2104, 2106), which alleges that "the personal property of said estate is insufficient for the payment of the debts thereof, and that therefore it is necessary, and will be to the interest of said estate, to sell the lands hereinafter named, for the payment of the debts of said estate," is sufficient to confer jurisdiction on the probate court to decree a sale of said lands. *Kent et al. v. Mansel et al.*, 334.
 8. *Decree of sale of decedent's lands; presumption in favor of the decree of the probate court on collateral attack.*—When, in an action of ejectment, a decree of the sale of decedent's lands is attacked, on the ground that the evidence in the proceedings in the probate court was not taken in the manner required by statute (Code, § 2111), the order of sale of said lands by the probate court is not set out in the record, but the statement is made that the court rendered a decree ordering said lands to be sold for the payment of the debts of said estate, this court, on appeal, will presume that the order or judgment of the probate court contained all that was necessary to uphold its validity, including the finding that proof of the necessity of the sale to pay the debts was made by disinterested witnesses, as provided by the statute, and that such order was sufficient. *Ib.* 334.
 9. *Order of sale collaterally attacked; error must affirmatively appear on the face of the record.*—When a decree of the probate court ordering the sale of the decedent's lands for the payment of debts is collaterally attacked, the decree will not be annulled and set aside, unless the matters relied on as avoiding the adjudication appear affirmatively on the face of the record. *Ib.* 334.
 10. *Bill in equity to have a lien declared; what is a final decree.*—Where, in a bill filed by heirs to have a lien declared in their favor upon a certain lot, alleged to have been purchased and improved by the administratrix of their decedent's estate, partly with the funds of the estate, which lot had been mortgaged by her to her co-defendants, it is shown that a part of the debt secured by said mortgage was an individual debt of the administratrix secured by a prior mortgage given by her on said lot, and which was assumed by her co-defendants, a decree holding the mortgage by the administratrix to her co-defendants to be a superior lien on the lot, to the extent of the debt assumed by the mortgagees, and that as against the remainder of the debt secured by said mortgage complainants were entitled to relief, at the same time giving particular instructions and directions to the register as to the manner of taking and stating an account between the parties, settles all the equities of the bill as between the complainants and the defendants, and is a final decree, from

EXECUTORS AND ADMINISTRATORS—*Continued.*

which an appeal may be prosecuted. *Foley et al. v. Lera et al.*, 395.

1. *Misapplication of funds by administrator; rights of heirs and personal creditors.*—Where an administrator has used the funds of his intestate's estate in the purchase of lands, taking the title in himself, the distributees and heirs may, at their election, either claim the lands with rents, or hold the administrator responsible for the money with interest and have a lien declared on the land for the payment thereof; but having elected to claim the money and interest, they can not also claim the land in which the money of the estate was invested, or the rents thereof, and in a bill filed by the heirs to have a lien declared in their favor on the lands, there is no error in a decree treating the rents from the land as the property of the administrator, and in applying them to the payment of his individual debts. *Ib.* 395.
12. *Same.*—Where one, who is the administratrix of an estate, borrows money on her own account, with which the estate of her intestate has nothing to do, and pays the money on her individual mortgage debt, and she afterwards uses money of the estate to re-fund her lender, no equity arises out of such a conversion by the administratrix in favor of the heirs of the estate against the mortgagees, to whom she paid the borrowed money. *Ib.* 395.

EXEMPTIONS.

1. *Trespass; effect of decree of probate court setting apart such articles as widow's exemption.*—In an action of trespass for the wrongful disturbance of plaintiff's possession and occupancy of a bedroom, the fact that the articles claimed by the defendant and attempted to be taken from the room, had been set apart to her and a minor son of her late husband by his former marriage by a decree of the probate court as a part of their exempt personalty, did not confer upon such defendant the right to enter the room against the plaintiff's protest. *Milner et al. v. Milner*, 599.

FEES.

1. *Clerk's fees for summoning defendant's witnesses; not payable out of the fine and forfeiture fund.*—The fees of the clerk of a court for issuing subpoenas for witnesses in a criminal case at the request of a defendant, who was acquitted, can not be paid out of the fine and forfeiture fund of the county; such services of the clerk being rendered for defendant create a debt against him, and must be paid by him. *Burgin v. Hawkins*, 326.
2. *Act to pay solicitors' salaries; counties' right to surplus in the state treasury.*—Under the provisions of the "act to pay solicitors' salaries," approved February 18, '887, (Acts 1886-87, p. 161), there must be annual adjustments and ascertainments of the surpluses of solicitors' fees paid into the state treasury over and above the salaries of solicitors, by deducting the aggregate of the salaries of solicitors from the aggregate of all solicitors' fees paid into the state treasury during the preceding year, from whatever source derived; and each county is then entitled to receive its proportionate share in the remainder. *Purifoy v. Andrews*, 643.
3. *Same; computation without regard to judicial circuits or act of February 25, 1889.*—Such annual adjustments and ascertainments must be made without regard to the judicial circuits, and are unaffected by the act approved February 25, 1889, (Acts 1888-89, p. 55), providing for payments out of the state treasury of the costs in cases where the defendants are sentenced to imprisonment in the penitentiary. *Ib.* 643.

FEES—Continued.

4. *Mandamus to compel auditor to draw warrant for counties' share of surpluses in state treasury from solicitors' fees.*—After adjustment and ascertainment of the surplus of solicitors' fees in the state treasury, over and above the salaries paid solicitors, as provided by act of February 28, 1887, (Acts 1886-87, p. 161), the auditor must draw his warrants on the treasurer in favor of the counties, respectively, for the several sums ascertained to be due them; and upon his refusal to do so, he may be compelled there-to by *mandamus*. *Ib.* 643.

FINE AND FORFEITURE FUND.

1. *Clerk's fees for summoning defendant's witnesses; not payable out of the fine and forfeiture fund.*—The fees of the clerk of a court for issuing subpoenas for witnesses in a criminal case at the request of a defendant, who was acquitted, can not be paid out of the fine and forfeiture fund of the county; such services of the clerk being rendered for defendant create a debt against him, and must be paid by him. *Burgin v. Hawkins, Treasurer*, 326.
2. *County certificates not commercial paper.*—County certificates, issued for jurors' and bailiffs' services, are not negotiable commercial paper, and the purchaser thereof takes them subject to all the defenses which the county may have against the transferee. *Allen, Bethune & Co. v. McCreary, et al.*, 514.
3. *Purchase by treasurer's deputy of county certificates.*—A purchase by a county treasurer's deputy, who performs all the duties of the office, of jurors' and bailiffs' certificates when he has county funds in his hands, and which he does not account for on the expiration of his term of office, is in law a payment of such certificates of the county with the county funds which were unaccounted for, and the transferee of the deputy can not collect them from said treasurer's successor in office. *Ib.* 514.

FRAUD.

1. *Stockholders of a corporation; fraud as a defense to action on note for subscription.*—Where one has been induced by fraud to become a stockholder in a corporation, he may set up this fraud as a defense to an action on his note, given for the payment of the amount of his subscription. *Bibb v. Hall*, 79.
2. *Subscription to stock; fraud therein; evidence.*—Where, in an action by the transferees of a note, given by a subscriber to the capital stock of a railroad corporation, for the amount of his subscription, the maker of the note, by special plea interposes a defense of fraud in procuring his subscription, and the failure and want of consideration for the note, it is shown by the evidence that the only condition attached to the subscription was that the railroad was to be finished between certain terminal points within a certain time, and that it was to issue to each subscriber two thirds of the amount subscribed for of its own capital stock, and one third of the amount in the capital stock of a corporation formed to build said railroad; that the note subsequently executed for the amount of the subscription contained conditions relating only to the time and manner of the completion of the road, and made no reference to stock in the company formed to build said railroad; that on the day of the execution of the note the maker accepted from the said construction company its obligation to exchange one third of its stock for a like proportion of the amount of his subscription in the railroad company, when the note sued on was paid; that at the time of the execution of the note, and the last mentioned agreement, both corporations had received their certificate of

FRAUD—Continued.

incorporation, and had performed all preliminary acts entitling them to such certificate, except the payment of 20 per cent of the capital stock; and that the maker of the note himself testified that no representations were made to him that such 20 per cent had been paid, and he did not inquire or investigate the matter, the fraud attempted to be set up as a defense is not sustained, and there is shown no failure or want of consideration for the note sued on. *Ib.* 79.

FRAUDS, STATUTE OF.

1. *Statute of frauds; waiver as a defense to a bill for specific performance.*—The statute of frauds, as a defense to a bill for the specific performance of a contract, is waived unless specially pleaded; and the contract being admitted or satisfactorily proved, it will be enforced although it may be obnoxious to the statute. *Whisenant v. Gordon*, 250.
2. *Conveyance of land; must be in writing.*—Conveyances of land must be in writing, and their execution must be accomplished by formalities, the observance of which is calculated to remove all doubt or uncertainty as to the grantor's intention to divest himself of the title to the land conveyed. *Ib.* 250.
3. *Parol agreement for conveyance of land; when specifically enforced.*—A parol agreement for the re-conveyance of land will be specifically enforced, at the suit of the vendee of the original vendor, when the circumstances surrounding the transaction, the conduct of the parties, and the declarations of the grantee in the original conveyance show that it was the intention of the parties to rescind the former sale and revest the title in the grantor. *Ib.* 250.
4. *Statute of frauds; promise to answer for debt, default or miscarriage of another.*—When, at the instance of one person, goods are sold to another for his sole use and benefit, and any credit whatever is extended to the party to whom the consideration moves, the debt is that of the latter, and the other party's obligation is that of guarantor, which, under the statute (Code, § 1732), to be binding must be in writing. *Webb v. Hawkins Lumber Co.*, 630.
5. *Same.*—When in an action to recover for goods sold, it is shown that the defendant applied to the plaintiff to fill an order for another person, and said that he, the defendant, "would guarantee the bill and pay for it," and that thereupon the goods were shipped and the account was charged on the books of the plaintiff to the person for whom the goods were bought, and that the plaintiff looked for payment to both the defendant and the person for whom the goods were bought, the promise of the defendant was to answer for the debt, default or miscarriage of another (Code, § 1732), and to be binding should have been in writing, expressing a consideration, signed by him. *Ib.* 630.

FRAUDULENT CONVEYANCES.

1. *Bill to set aside conveyances as fraudulent; denials of the answer.*—An answer to a bill of complaint that contains a mere general denial of the matters charged is not sufficient; and in response to a bill filed to set aside conveyances as fraudulent, the answer must specifically deny the allegations that charge material matters, *prima facie* within the knowledge of defendants, which render the conveyances fraudulent and void, or such allegations will be considered as admitted and true, entitling the complainant to the relief sought. *Moog v. Barrow*, 209.

FRAUDULENT CONVEYANCES—*Continued.*

2. *Fraudulent conveyances; evidence on bill filed to set them aside.*—Where an insolvent debtor conveys lands to some of his creditors by a deed absolute in form, in alleged payment of a debt greatly less than the value of the lands, and the creditors subsequently convey the same lands to the wife of the debtor upon a recited cash consideration, greatly less than the value of the lands, and at the time of the latter conveyance the said creditors accounted to the debtor for the rents collected and taxes paid by them pending their possession, and offers to purchase said lands were referred to the debtor, who continuously claimed the ownership thereof, the deed to the creditors will be construed a mortgage, and upon a bill filed by other creditors of the said debtor for that purpose, both of the conveyances will be set aside as fraudulent and void. *Ib.* 209.
3. *Same; variance between proof and allegations*—When, in a bill filed to set aside as fraudulent a conveyance from an insolvent debtor to certain creditors and a conveyance from the said creditors to the wife of the debtor, the bill averred that the debtor owned the lands in fee, and the proof showed that it was owned jointly by the said debtor and one who was not a party to the suit, there is no variance between the allegations and proof, so far as the parties to the suit are concerned, since the wife did not claim title from the joint owners of the land, but derived her title from her husband's grantees. *Ib.* 209.
4. *Fraudulent conveyance; when more goods delivered than mentioned in bill of sale.*—In a statutory claim suit, where an attaching creditor attacks as fraudulent the sale of the attached property by the debtor to the claimant, if it is shown that there were delivered to the claimant more goods than were mentioned in the bill of sale, the transaction is fraudulent as to the other creditors of the debtor, and the entire sale should be set aside as fraudulent and void. *Claffin & Co. v. Rodenberg*, 213.
5. *Charge as to fraudulent conveyance.*—In a statutory claim suit, where the sale to the claimant is attacked as fraudulent, a charge which instructs the jury that they must find a verdict for the claimant, if the evidence in the case shows an honest intent on the part of the claimant (grantee) to secure the payment of a *bona fide* indebtedness, and that there was no reservation of benefit to the debtors in the purchase of said goods from them, and that the claimant received no more goods than was sufficient to pay his debts, asserts a correct proposition of law, and is properly given. *Ib.* 213.
6. *Conveyance attacked as fraudulent; relevant evidence.*—On an issue formed questioning the *bona fides* of a transfer of property, in payment of an alleged indebtedness, if the debt is established as real, the pivotal question is whether there was such disparity between the value of the property transferred and the amount of the debt as to be indicative of fraud; and in determining this question, the evidence of the market value of the transferred property is relevant and admissible. *Bates v. Morris*, 282.
7. *Conveyance of stock of goods, absolute in form, but intended as a mortgage.*—A conveyance of his entire stock of goods by a debtor to one of his creditors, in form an absolute sale, but intended only as a mortgage or as a security for an indebtedness, the debtor being permitted to remain in possession, to carry on the business, and to sell the property in regular course of trade for his own benefit, is made in trust for his own use, and is, therefore, under the provision of the statute (Code, § 1730), fraudulent and void as against subsequent, as well as existing creditors. *O'Neil v. Birmingham Brewing Co.*, 383.

FRAUDULENT CONVEYANCES—*Continued.*

8. *Bill to set aside fraudulent conveyance; joinder of existing and subsequent creditors.*—Where a transfer by a debtor to one of his creditors, in form an absolute sale, but intended as a security for an indebtedness, is void under section 1730 of the Code, as being made for the use of the debtor executing the conveyance, existing and subsequent creditors may join in a bill seeking to set aside such conveyance as fraudulent and void. *Ib.* 383.
9. *Suit in equity against a partnership; married woman being a partner no defense to a bill, and does not invalidate a contract made by the firm.*—Where the sole purpose of a bill, filed to cancel as fraudulent a conveyance by a partnership, is to subject to the satisfaction of complainants' demand the assets of said partnership, it is no objection to said bill that one of the partners is a married woman, nor does such a fact destroy the binding obligation of the contracts by which the firm became indebted to the complainants. *Ib.* 383.
10. *Bill to set aside fraudulent conveyance; not demurrable for failure to aver that defendants were not licensed to sell liquors, which form part of consideration of complainants' debt.*—A bill filed by creditors seeking to set aside as fraudulent and void a conveyance by their debtor to other creditors, which avers that a part of the consideration of the debt sought to be enforced was spirituous, vinous or malt liquors, is not subject to demurrer because it fails to aver that the complainants were licensed to make said sales; the *prima facie* presumption of the law being that they had complied with the revenue statutes, and taken out the required license. *Ib.* 383.
11. *Same; when not necessary to aver insolvency of debtor.*—When a bill is filed by creditors to set aside a conveyance of their debtor to other creditors as fraudulent and void under the provisions of section 1730 of the Code, it is not necessary to aver the insolvency of the debtor, since the creditor has a right to pursue and subject the property conveyed by his debtor to the latter's own use and benefit, notwithstanding the debtor may have other property which might be subject to said debt. *Ib.* 383.
12. *Fraudulent conveyance; payment of a pre-existing debt.*—A transfer in 1891 by a failing debtor of his stock of goods, at its fair market value, in payment of a valid, pre-existing debt, is not fraudulent, if the debt was absolute, and the property conveyed was received at its reasonably fair market value, and no benefit was secured to the debtor beyond a release from debt. *Curran & Co. v. Olmstead & Schenck*, 692.
13. *Bill in equity to set aside conveyance as fraudulent; alternative averments.*—Where, in a bill filed to set aside a conveyance as fraudulent, the charge of fraud is made disjunctively, each alternative averment of the bill of complaint must state a sufficient cause of action. *Ib.* 692.
14. *Same; sufficiency of averment.*—In a bill filed to set aside as fraudulent a conveyance from a failing debtor to a creditor, a mere averment therein that the conveyance by the debtor to the creditor was for the purpose of hindering, delaying and defrauding his other creditors, and that the preferred creditor participated in such intent, is not sufficient as a statement of the cause of action; to be sufficient, the facts which constitute the fraud must be averred. *Ib.* 692.

FOREIGN CORPORATIONS—See CORPORATIONS, SUB-TITLE.

"F. O. B."

1. "*f. o. b.*;" *judicial knowledge.*—Courts judicially know that "*f. o.*

"F. O. B."—*Continued.*

b." in contracts of sale, where the property sold is to be transported, mean, "free on board" the cars at a certain place named in the contract. *Sheffield Furnace Co. v. Hull Coal & Coke Co.* 446.

2. *Same; evidence of custom and usage*—Where a contract of sale specifies the price of the article sold, "f. o. b. cars" at a certain place of destination, named in the contract, parol evidence of the custom and usage as to the payment of freight on the particular article sold, which would give to the terms a different meaning or operation than would have attached had the words of which they are the initials been originally inserted in the contract, is inadmissible; in such a contract the price stipulated is for the articles free on board the cars at the place of destination, and does not impose upon the buyer the duty of paying the freight thereon. *Ib.* 446.

FREIGHT.

1. *Contract of sale; reduction of freight rates.*—In a contract of sale for a stipulated price at a certain place of delivery, a provision "that it is understood that" the seller has freight rates to the point of delivery, "on which the above price is based, but if, during the time this contract is in force this rate should be advanced, then the buyer has the option to take any undelivered portion due on his contract at the advance, or of cancelling it, provided the seller does not elect to stand said advance," does not entitle the buyer to the benefit of reductions of freight rates accruing after the execution of the contract, and while it was being performed. *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 446.

GARNISHMENT.

1. *Subscribers to bonds of a corporation; liable as garnishees.*—Where the contract of subscription to bonds of a corporation provides that upon the payment of the entire amount of the subscription an equal amount of fully paid-up stock of the corporation shall be paid over to the holders of the bonds, and that the subscription is to be paid in monthly instalments of fixed sums, a subscriber to the bonds under such contract, who has paid three instalments, is a debtor to the corporation for the balance due upon his subscription, in such sort as to be subject to process of garnishment by creditors of the corporation, and liable as garnishee to the extent of such balance due and unpaid upon his subscription for the bonds. *Davis v. Montgomery F. & C. Co.*, 127.

GUARDIAN AND WARD.

1. *Probate of a will; service of notice on infants.*—In a proceeding for the probate of a will, service of notice upon infants next of kin by handing them a copy is insufficient to bring them into court; the copy should have been left with father, mother, guardian, or other person having the custody of the minors. *Herring et al. v. Ricketts et al.*, 340.
2. *Appointment of guardian ad litem for infants.*—Until infants are brought into court by a service of process, according to the rules of practice, the appointment of a guardian *ad litem* for them is unauthorized, irregular, and not sufficient to support a decree against them. *Ib.* 340.
3. *Probate of a will; notice thereof.*—If a will is admitted to probate without legal service of notice upon the persons who are by law entitled thereto, the probate will be vacated and revoked on their application. *Ib.* 340.

GUARDIAN AND WARD—*Continued.*

4. *Application to vacate probate of a will; no presumption in favor of the probate*—On the application to vacate the probate of a will, there is no presumption in favor of the order of probate, the petition to vacate being a direct and not a collateral attack. *Ib.* 340.

HEIRS.

1. *Misapplication of funds by administrator; rights of heirs and personal creditors*.—When an administrator has used the funds of his intestate's estate in the purchase of lands, taking the title in himself, the distributees and heirs may, at their election, either claim the lands with rents, or hold the administrator responsible for the money with interest and have a lien declared on the lands for the payment thereof; but having elected to claim the money and interest, they can not also claim the land in which the money of the estate was invested, or the rents thereof, and in a bill filed by the heirs to have a lien declared in their favor on the lands, there is no error in a decree treating the rents from the land as the property of the administrator, and in applying them to the payment of his individual debts. *Foley et al. v. Lera et al.*, 395.
2. *Same*.—Where one, who is the administratrix of an estate, borrows money on her own account, with which the estate of her intestate has nothing to do, and pays the money on her individual mortgage debt, and she afterwards uses money of the estate to refund her lender, no equity arises out of such a conversion by the administratrix in favor of the heirs of the estate against the mortgagees, to whom she paid the borrowed money. *Ib.* 395.
3. *Bill in equity to have a lien declared; what is a final decree*.—Where, in a bill filed by heirs to have a lien declared in their favor upon a certain lot, alleged to have been purchased and improved by the administratrix of their decedent's estate, partly with the funds of the estate, which lot had been mortgaged by her to her co-defendants, it is shown that a part of the debt secured by said mortgage was an individual debt of the administratrix secured by a prior mortgage given by her on said lot, and which was assumed by her co-defendants, a decree holding the mortgage by the administratrix to her co-defendants to be a superior lien on the lot, to the extent of the debt assumed by the mortgagees, and that as against the remainder of the debt secured by said mortgage complainants were entitled to relief, at the same time giving particular instructions and directions to the register as to the manner of taking and stating an account between the parties, settles all the equities of the bill as between the complainants and the defendants, and is a final decree, from which an appeal may be prosecuted. *Ib.* 395.

HOMESTEAD.

1. *Purchasers of public land under act of June 15, 1880*.—Under the provisions of the act of Congress of June 15, 1880 (1 Sup. Rev. Stat. p. 558), only the person who has made entry of homestead and failed to perfect the same, or the transferee of such entryman by writing, executed in good faith, can purchase the land attempted to be entered. *Mulloy v. Cook*, 178.
2. *Contract violative of the public policy of the United States*.—A verbal contract by one who makes a homestead entry of Government land and fails to perfect the same, to purchase such lands under the act of Congress of June 15, 1880, (1 Sup. Rev. Stat. p. 558), and upon receipt of patent convey the lands to the one

HOMESTEAD—*Continued.*

- who furnishes the money with which to make the purchase, is violative of the policy of the General Government, and can not be made the basis of equitable relief to enforce a trust in such lands in favor of the one whose money was used in paying therefor. *Ib.* 178.
3. *Sale of homestead for distribution; when owned jointly by husband and wife can not be made against the wife's objections.*—When a homestead is owned jointly by husband and wife, the probate court can not, upon petition by the husband, decree a sale thereof for distribution against the wife's objections. *Mitchell v. Mitchell*, 183.
 4. *Same.*—The fact that at the time of the filing of the petition by the husband for the sale, for distribution, of the homestead owned jointly by husband and wife, the said husband and wife were living separate and apart, does not give the probate court the right to order a sale of the homestead, against the objection of the wife. So long as the relation of husband and wife exists, the home of the husband is deemed to be the home of the wife. *Ib.* 183.
 5. *Homestead set apart to the widow; her estate therein*—When a homestead, which does not exceed 160 acres and two thousand dollars in value, has been set apart to the widow as exempt under the act approved February 12, 1885, (Sess. Acts 1-4-85, p. 114), she takes an absolute inheritable estate in such homestead. *Smith et al v. Boutwell*, 373.
 6. *Proceedings to set apart homestead; objections can not be raised on collateral attack.*—In an action of ejectment, involving the widow's title to the homestead, an objection that the record of the proceedings to set apart the homestead to the widow did not show affirmatively that the commissioners appointed were "citizens of good standing," can not be raised. *Ib.* 373.
 7. *Constitutionality of statute regulating descents and succession to property.*—The act approved February 12, 1885, (Sess. Acts 1884-85, p. 114), which provides for the setting apart of the homestead exemption to the widow, and defines her estate therein, is constitutional, since "each State has the right to enact laws for the regulation of descents and succession to property within its limits." *Ib.* 373.

HUSBAND AND WIFE.

1. *Sale of homestead for distribution; when owned jointly by husband and wife can not be made against the wife's objections.*—When a homestead is owned jointly by husband and wife, the probate court can not, upon petition by the husband, decree a sale thereof for distribution against the wife's objections. *Mitchell v. Mitchell*, 183.
2. *Same.*—The fact that at the time of the filing of the petition by the husband for the sale, for distribution, of the homestead, owned jointly by husband and wife, the said husband and wife were living separate and apart, does not give the probate court the right to order a sale of the homestead, against the objection of the wife. So long as the relation of husband and wife exists, the home of the husband is deemed to be the home of the wife. *Ib.* 183.
3. *Earnings of wife; separate estate therein.*—Prior to the act approved February 28, 1887, by which the earnings of the wife were made her separate estate, the husband could, by contract, gift or renunciation of all right to them, invest the wife with a separate estate therein; and while such voluntary gift or renunciation is not valid as against the husband's existing creditors,

HUSBAND AND WIFE—*Continued.*

- it is valid as to subsequent creditors, unless shown to have been infected with actual fraud. *Bates v. Morris*, 282.
4. *Homestead set apart to the widow: her estate therein.*—When a homestead, which does not exceed 160 acres and two thousand dollars in value, has been set apart to the widow as exempt under the act approved February 12, 1885, (Sess. Acts 1884-85, p. 114), she takes an absolute inheritable estate in such homestead. *Smith v. Boutwell*, 373.
 5. *Suit in equity against a partnership; married woman being a partner no defense to a bill, and does not invalidate a contract made by the firm.*—Where the sole purpose of a bill, filed to cancel as fraudulent a conveyance by a partnership, is to subject to the satisfaction of complainants' demand the assets of said partnership, it is no objection to said bill that one of the partners is a married woman, nor does such a fact destroy the binding obligation of the contracts by which the firm became indebted to the complainants. *O'Neil, et al. v. Birmingham Brewing Co. et al.*, 383.
 6. *Husband and wife; statute securing wife's separate estate.*—Under the common law, so long as the marital relation is maintained, the husband is the head of the family, determines where the home shall be, controls all things belonging to the household and premises, and directs the economy and administration of domestic affairs; and our statutes, securing to the married woman her separate estate, (Code, §§ 2341-2356), have wrought no change in these relative rights and duties. *Strouse v. Leips*, 433.
 7. *Same; effect of section 2345.*—The statute that declares that the husband is not liable for a tort of the wife, in the commission of which he did not participate, (Code, § 2345), provides a new remedy for an actionable tort committed by the wife, and requires that action therefor should be brought against the wife, but does not declare an enlarged liability on the part of the wife for torts. *Ib.* 433.
 8. *Same; action against wife for injuries caused by a dog owned by her.*—Where a dog, which is owned by a married woman, and known to be ferocious and vicious, is kept on the premises owned by her, where she and her husband reside, and escaping therefrom inflicts injuries, the wrongful act is the keeping of the dog, and the husband, being the head of the family and having control of the premises, is liable for such injuries, and no action therefor can be maintained against the wife. (McCLELLAN, J., dissenting.) *Ib.* 433.

INFANTS.

1. *Infants; ratification after attaining majority.*—A contract by an infant, being merely voidable, and not void by reason of the infancy, is subject to ratification after attaining majority, and any declaration or acts by the infant, after arriving at full age, that clearly recognize the existence of the contract as a binding obligation, will constitute a ratification, although at the time of the declaration made or the act done the infant did not know that he or she had a right to avoid the contract. *Amer. Mortg Co. v. Wright*, 658.
2. *Execution of mortgage by infant; ratification by payment of interest notes.*—Where a mortgage is executed by an infant as security for money loaned, the payment, after arriving at full age, of the interest notes as they mature, is a ratification of the voidable contract, which thereafter becomes a binding obligation. *Ib.* 658.

INJUNCTION.

1. *Injunction; when granted to enjoin trespass.*—A court of equity will not grant an injunction to prevent the commission of trespasses, unless the complainant shows a satisfactory title to the *locus in quo*; and if the title be denied or in doubt, the injunction will be refused against the defendant who is in possession, until the title is established at law. *Kellar v. Bullington*, 267.
2. *Same.*—An injunction will not lie in favor of a complainant not in possession of the actual property trespassed upon, to restrain the removal of stone from lands of which the defendants had possession under a claim of ownership, when the complainant obtained title thereto from the Government by his entry as a homestead, until the disputed question of title has been adjudicated. *Ib.* 267.
3. *Bill to enjoin sale of stock; corporation necessary party.*—Where a bill is filed by a stockholder to enjoin the sale by a corporation of his stock to settle an indebtedness due to the corporation, upon the ground that the debt is not due, or has been paid, or that the corporation is indebted to the shareholder in an amount exceeding that claimed to be due the corporation, and which prays for a settlement of account, the corporation itself is an indispensable party. *Elliott v. Sibley, et al.* 344.
4. *Same; complainant must offer to do equity.*—In a bill filed by a stockholder to enjoin the sale of his stock by a corporation, on the ground that the corporation is indebted to him in an amount exceeding his indebtedness, and which also prays for a settlement of account, the complainant must offer to do equity by averring in his bill a readiness and willingness to pay whatever amount may be ascertained to be due from him to the corporation. *Ib.* 344.
5. *Bill to enjoin sale of stock; necessary averments.*—In a bill by a stockholder to enjoin the sale by the corporation of his stock, in payment of his debt to said corporation, on the ground that he has a claim against the corporation in excess of his alleged indebtedness, the complaint must aver some fact other than the existence of his demand, which is a proper subject of set-off in order to give his bill equity—such as the insolvency of the corporation, or any other fact respecting his alleged claim, which would justify the interposition of a court of equity. *Ib.* 344.
6. *Dissolution of injunction.*—When an answer to a bill seeking an injunction specifically denies the principal allegations of the bill, upon which rests the right of the relief asked, the temporary injunction is properly dissolved. *Ib.* 344.
7. *Bill in equity to enjoin obstruction of alley-way; evidence.*—Where, on a bill filed to enjoin the obstruction of an alley-way it is shown that the description in the deed granting the said way from the defendant to the complainant was indefinite, but that after the grant the way was definitely located by the defendant, and was used by the complainant, evidence of oral statements made by the parties prior to the execution of the deed, indicating a purpose on the part of the grantor to acquire at some future time other adjacent lands, and locate a way different from that which was located, is incompetent. *Wharton v. Han-*
non, 554.
8. *Enjoining obstruction of alley-way; jurisdiction of equity.*—Where a deed granting an alley-way does not definitely describe the location thereof, but the way is designated by the grantor and is accepted and used by the grantee, and the said grantor afterwards obstructs the way thus designated and used, a court of equity, upon proper bill filed, will enjoin such obstruction, notwithstanding a better alley-way has been opened by the

INJUNCTION—*Continued.*

- grantor and offered to the grantee, and although the use of the obstructed alley-way involves the crossing with teams, &c., of a sidewalk on a much used street in a city. (STONE, C.J. dissenting, holds that, in the absence of the averment, that the grantor was insolvent, and of facts showing that complainant could not obtain ample redress in an action at law, and in view of the fact that another and better way was tendered, the granting of an injunction is discretionary, and complainant in this case should be left to his action at law.) *Ib.* 554.
9. *Same.*—In such a bill, filed to enjoin the obstruction of an alley-way by the grantor, there should be averments that the location of the alley-way was made, and a description of the way so located; proof of location without averment is not sufficient to warrant relief. *Ib.* 554.
 10. *Injunction against a railroad corporation voting stock in another railroad corporation.*—Where one railroad corporation has purchased a majority of the stock of another railroad corporation, with the intent and purpose of getting the management and control thereof, in order to defeat or lessen competition in the businesses of the two companies, or to encourage monopoly, and the corporation owning the majority of the other's stock violates duties in respect of the property and rights of the other company and its stockholders, committing willful wastes and subjecting said company to a multiplicity of suits, a court of equity will interfere, by an injunction at the suit of a minority of the stockholders, to restrain the said corporation owning the majority of the stock from the use of said stock in the management of the affairs of the other corporation and in the election of its officers. *George v. Cen. R. R. & B. Co.*, 607.
 11. *Same; jurisdiction of court of equity notwithstanding property in the hands of a receiver.*—In a bill filed to enjoin a railroad corporation owning a majority of the stock in another railroad corporation from voting its stock in the management of the affairs of the latter company, and in the election of its officers, the jurisdiction of the court is not ousted, and the right to grant the relief prayed for is not effected, by the fact that the road whose stock is controlled by the other corporation is in the hands of a receiver, appointed by other courts. *Ib.* 607.
 12. *Same; laches.*—Where a bill is filed by stockholders in a corporation to enjoin another corporation owning a majority of the stock of the former corporation from voting its stock in the control of the affairs and in the election of the officers of the said corporation, the fact that the complainant stockholders, after full knowledge of the grounds of complaint alleged in their bill, or full opportunity to acquire such knowledge, acquiesced in the acts complained of for more than six years, does not debar them from having enjoined such use of the stock in the future. *Ib.* 607.
 13. *Injunction against a corporation at suit of stockholders: previous request to directors for action.*—A minority of the stockholders of a corporation cannot maintain a bill in equity to prevent illegal action on the part of the majority, without a previous request to the proper officers to interfere, and their failure or refusal to do so; but when it is shown that a majority of the stock of said corporation is owned by another corporation, which practically creates and controls the managing and governing bodies of said corporation, the necessity for such a demand upon the governing body is dispensed with, as any such demand would be fruitless. *Ib.* 607.
 14. *Appeal; decree discharging injunction.*—An appeal does not lie

INJUNCTION—*Continued.*

from a decree of a chancellor rendered in vacation discharging an injunction. *Winter v City Council of Montgomery*, 649.

15. *Same; what considered when no answer filed to a bill for an injunction, and no grounds for the dissolution are given.*—On an appeal from a decree dissolving an injunction, and the grounds upon which the writ are dissolved are not stated, and there was no answer filed to the bill seeking the injunction, the consideration will be confined to the pleadings of the bill as they appear upon its face. *Ib.* 649.

INSURANCE.

1. *Notes given for life insurance premiums; invalid defense.*—In an action on notes, given by the defendant to the plaintiff, who was the agent of a foreign insurance company, for money he had advanced for the defendant, for the payment of his premiums to said insurance company, it is no defense that said company had not complied with the statutory provisions, relative to the doing of business in this State by foreign corporations. *Russell v. Jones*, 261.
2. *Insurance company; agent's mis-statements do not avoid policy.*—Where an applicant for insurance makes full and true answers to the questions contained in the application, but the agent, himself writing the application, knowingly and intentionally writes down the answers different from the statements made by the insured, the insurance company can not avoid its obligation under said policy, on the ground that the interest of the insured was not truly stated in the application, as required by the policy. *Creed et al. v. Sun Fire office of London*, 522.
3. *Creditor has insurable interest in deceased creditor's property.*—The creditor of a deceased debtor, whose estate is insufficient to pay his debts, has an insurable interest in the property of the estate, which may be subjected by a proceeding *in rem* to the payment of his debts; but the recovery can not exceed the amount of the insurable interest. *Ib.* 522.
4. *Action on insurance policy; pleadings.*—In an action on an insurance policy, pleadings that allege that the building insured belonged to the estate of the deceased person, who owned no other real estate, that the said building and lot on which it was situated were subject to the homestead and dower right of the deceased's widow, who was one of the insured, that the other insured was a creditor of the deceased, and that the personal assets of his estate were insufficient to pay his debts, show an insurable interest in said building in both of the insured. *Ib.* 522.
5. *Fire insurance policy; limitations therein.*—The stipulation in a policy of insurance that the company "shall be liable only for such proportion of the whole loss as the insurance bears to the cash value of the whole property thereby insured at the time of the fire," and that "other concurrent insurance [is] permitted without notice until required," limits the insurance company's liability to the proportion the insurance bears to the cash value of the property at the time of the loss, without regard to the existence of concurrent insurance. *Christian & Daniel v. Niagara Fire Ins. Co.*, 634.
6. *Limitations in fire insurance policy; what not unreasonable.*—In an open fire insurance policy on cotton in a warehouse, the limitation that the company "shall be liable only for such proportion of the whole loss as the insurance bears to the cash value of the whole property thereby insured at the time of the fire," is not unreasonable or unjust, nor contrary to law or public policy. *Ib.* 634.

JUDGES.

1. *Adjudication by a judge of his own incompetency not conclusive.*—The adjudication by a judge of his own incompetency to hear and determine a cause, and the entry of this conclusion on the record of his court, is not determinative or conclusive of the inquiry of incompetency *rel non*, on application for *mandamus*, or on appeal. *Medlin v. Taylor*, 239.
2. *Incompetency of a judge; how determined on application for mandamus, and on appeal.*—When application is made to the circuit judge for a writ of *mandamus*, to compel the judge of probate to hear and determine a certain cause, which he has adjudged himself incompetent to try, it is the duty of the circuit judge to determine the question of incompetency upon the facts disclosed, regardless of any adjudication made thereon by the judge whose incompetency is at issue; and a like duty devolves upon this court on appeal from the *mandamus* proceedings. *Ib.* 239.
3. *When probate judge incompetent to hear an election contest.*—Where a contest of the election of a tax collector is instituted before a probate judge, who was declared elected at the same time as was the contestee, and whose election was being contested before the judge of the circuit court upon the same grounds specified in the statement of contest filed by the contestant, such probate judge, although not disqualified under constitutional and statutory provisions, has, under the doctrine of the common law, such personal interest in the questions involved as to render him incompetent to hear and determine the contest, and to justify him in declining to do so. *Ib.* 239.
4. *When ruling by judge of probate in election contest not reviewed on appeal.*—Under the statutory provision, that "In contested election cases tried by the judge of probate, an appeal lies to the circuit court, to be tried *de novo*" (Code, § 432), rulings made by the judge of probate in contest proceedings instituted before him, even though erroneous, which were not carried into the rulings of the circuit court on appeal from the probate court, will not be reviewed by the supreme court. *Turnipseed v. Jones*, 593.

JUDGMENTS AND DECREES.

1. *Judgment; definition thereof.*—A judgment is a final consideration and determination by a court of competent jurisdiction of matters submitted to it, and it should, in form, always be complete and certain in itself, showing that it is the court's adjudication. *Bell v. Otts*, 186.
2. *Same; when insufficient to support an appeal.*—The statement in a judgment entry in an action of ejectment, just after the recital of the verdict, "and judgment is rendered against defendants, for the land sued for, together with all the costs in this behalf, for which execution may issue," is not such a judgment as will support an appeal; and when the transcript contains no other judgment entry, the appeal will be dismissed. *Ib.* 186.
3. *Decree before cause at issue erroneous.*—When, to a bill filed by the assignee of an insolvent debtor, which avers the levy of an attachment by the debtor's lessor and admits the justness of a claim for rent thus asserted, there have been no answers filed, and no decrees *pro confesso* have been rendered against the defendants not answering, the cause is not at issue; and an order of reference to ascertain the amount due the attaching lessor, and a decree that the amount so ascertained be paid is erroneous when rendered before the cause was at issue, and before the creditors of the assignor had an opportunity of presenting

JUDGMENT AND DECREES—*Continued.*

- and proving their claims. *Louisville Manfg. Co. v. Brown*, 273.
4. *Decree to support an appeal.*—A decree that settles matters of contention and the material equities in a cause will support an appeal. *Ib.* 273.
 5. *Same.*—An appeal lies from a decree in a suit by an assignee named in the deed of assignment for the execution of the trust, in which the debt is ascertained and ordered to be paid out of the proceeds of the assets, without giving creditors an opportunity to contest such debt, or to present and prove their claims. *Ib.* 273.
 6. *Decree of sale of decedent's lands; presumption in favor of the decree of the probate court on collateral attack.*—When, in an action of ejectment, a decree of the sale of decedent's lands is attacked, on the ground that the evidence in the proceedings in the probate court was not taken in the manner required by statute, (Code, § 2111), the order of sale of said lands by the probate court is not set out in the record, but the statement is made that the court rendered a decree ordering said lands to be sold for the payment of the debts of said estate, this court, on appeal, will presume that the order or judgment of the probate court contained all that was necessary to uphold its validity, including the finding that proof of the necessity of the sale to pay the debts was made by disinterested witnesses, as provided by the statute, and that such order was sufficient. *Kent v. Mansell*, 335.
 7. *Order of sale collaterally attacked; error must affirmatively appear on the face of the record.*—When a decree of the probate court ordering the sale of decedent's lands for the payment of debts is collaterally attacked, the decree will not be annulled and set aside, unless the matters relied on as avoiding the adjudication appear affirmatively on the face of the record. *Ib.* 335.
 8. *When decree of foreclosure erroneous.*—When, on a bill filed to have a mortgage executed on March 1, 1887, to a foreign corporation declared void and cancelled, as violative of section 4, Article XIV of the constitution and the act approved February 28, 1887, to give force and effect to this constitutional provision, there is no sufficient offer by complainant to do equity, or to submit himself to the authority and jurisdiction of the court, and the proof shows that the defendant has complied with the requirements of the said constitutional and statutory provisions, at the time of making the loan and taking the mortgage to secure it, a decree of foreclosure should not be rendered, but the bill, being without equity, should be dismissed. *Ross v. New Eng. Mortg. Sec. Co.* 362.
 9. *What is a final decree.*—A decree in chancery, which settles all the equities between the parties, leaving only matters of account to be adjusted on a reference before the master, is such a final decree as will support an appeal. *Foley v. Leva*, 395.
 10. *Limitation of appeal; when assignments of error are stricken out.*—Where an appeal is sued out in a chancery cause more than a year after the rendition of a decree which settled all the equities between the parties, such decree can not be reviewed, and all the assignments of error relating to matters embraced in that decree should be stricken out, upon motion, because the appeal was barred at the time it was taken. *Ib.* 395.
 11. *Bill in equity to have a lien declared; what is a final decree.*—Where, in a bill filed by heirs to have a lien declared in their favor upon a certain lot, alleged to have been purchased and improved by the administratrix of their decedent's estate, partly with the funds of the estate, which lot had been mortgaged by her to her co-defendants, it is shown that a part of the debt secured

JUDGMENT AND DECREES—*Continued.*

by said mortgage was an individual debt of the administratrix secured by a prior mortgage given by her on said lot, and which was assumed by her co-defendants, a decree holding the mortgage by the administratrix to her co-defendants to be a superior lien on the lot, to the extent of the debt assumed by the mortgagees, and that as against the remainder of the debt secured by said mortgage complainants were entitled to relief, at the same time giving particular instructions and directions to the register as to the manner of taking and stating an account between the parties, settles all the equities of the bill as between the complainants and the defendants, and is a final decree, from which an appeal may be prosecuted. *Ib.* 395.

12. *Rulings on motion to vacate an order in a judgment entry; should be shown by bill of exceptions.*—Where a motion to set aside and vacate an order contained in a judgment entry is overruled, and an exception is reserved thereto, such ruling, to be reviewed by the appellate court, must be presented by a bill of exceptions and when the transcript contains no bill of exceptions, presenting for review such ruling, which is the only question intended to be presented, the appeal will be dismissed. *Stern v. Collier et al.*, 424.
13. *Accounting and settlement of a partnership; when a reference is properly decreed.*—A bill was filed for an accounting between partners, and a settlement of the partnership after dissolution. The averments of the bill were not as definite as good pleading required, and no objection was made to the bill on this account; but respondent, in his answer, alleged that the partnership matters were so conducted that it was impossible to state an account approximately correct. The only evidence on this question was the testimony of the parties themselves, which, in some respects was irreconcilable. *Held*, that a decree ordering a reference was not erroneous, since upon such reference other evidence might be introduced, and a decree of confirmation would not be refused if the evidence taken upon the reference clearly shows a balance in favor of one partner; although it was impossible to make an absolutely correct statement of the account. *Costello v. Montague*, 426.
14. *Decree upon demurrers; when insufficient to authorize appeal therefrom.*—An entry, "submitted for decree upon demurrers to the bill and demurrers sustained," is not a decree sustaining the demurrers to a bill from which an appeal may be taken as provided by statute, (Code, § 3612); and when this is the only entry shown in the transcript of the docket entries of the chancellor, the appeal will be dismissed. *Mann et al. v. Hyams et al.*, 431.
15. *Notice of motion to vacate a judgment; when sufficient.*—Where a motion to set aside and annul a judgment against a defendant is spread upon the motion docket of the court wherein the judgment was recovered, is properly signed by counsel for movant, and addressed to the attorneys of record for the plaintiff, and when the motion is called for trial the said attorneys for plaintiff appear for the purpose of resisting action thereon at that time, on the ground that no written notice of the motion had been served upon them or their client, no further notice to the plaintiff or his attorneys is necessary; the appearance of the latter, even for the purpose of resisting action on said motion, showing sufficient notice of the pendency thereof. *Jennings v. Pearce*, 438.
16. *Judgment by default against non-resident; when properly set aside.*—When, in an action against a non-resident, there has been no personal service of notice of the suit made upon him, no ap-

JUDGMENT AND DECREES—Continued.

- pearance entered for him, no property of his held under an attachment levy, and no indebtedness to him, no property, or effects of his ascertained and fixed in the hands of a garnishee, the court never acquired jurisdiction of the person and property of such defendant, so as to authorize a judgment by default against him; and upon proper motion, seasonably made, the court must set aside and vacate such judgment. *Ib.* 438.
17. *Appeal; decree discharging injunction.*—An appeal does not lie from a decree of a chancellor rendered in vacation discharging an injunction. *Winter v. City Council of Montgomery*, 649.
18. *Same; what considered when no answer filed to a bill for an injunction, and no grounds for the dissolution are given.*—On an appeal from a decree dissolving an injunction, and the grounds upon which the writ are dissolved are not stated, and there was no answer filed to the bill seeking the injunction, the consideration will be confined to the pleadings of the bill as they appear upon its face. *Ib.* 649.

LACHES.

1. *Laches; bill to quiet title.*—One who has acquired title by adverse possession, can not be guilty of *laches* in instituting a suit to quiet his title and to remove as a cloud the title of another, who disputes the complainant's title acquired by adverse possession. *Torrent Fire Engine Co. v. City of Mobile*, 559.
2. *Injunctions; laches.*—Where a bill is filed by stockholders in a corporation to enjoin another corporation owning a majority of the stock of the former corporation from voting its stock in the control of the affairs and in the election of the officers of said corporation, the fact that the complainant stockholders, after full knowledge of the grounds of complaint alleged in their bill, or full opportunity to acquire such knowledge, acquiesced in the acts complained of for more than six years, does not debar them from having enjoined such use of the stock in the future. *George v. Central R. R. & Banking Co.*, 607.

LANDLORD AND TENANT.

1. *Action of trover by landlord against tenant for wood cut from rented premises.*—While an action of trespass for injuries to land by the tenant cannot be maintained by the landlord, so long as the tenancy continues, and trover can not be maintained by the owner of the land against one in adverse possession for the conversion of timber severed from the freehold, a landlord can maintain an action of trover against his tenant, pending the tenancy, for wood wrongfully cut from the demised premises, and converted by the tenant. Such action involves no inquiry as to the title of the land from which the severance was made, and no inquiry as to the possession of said land. *Brooks v. Rogers*, 111.
2. *A claim of forfeiture by landlord and a denial of forfeiture by tenant do not show adverse holding; exclusion of such evidence not error.*—The facts that the landlord claimed a forfeiture of the lands because of the wrongful severance by the tenant of timber from the leased premises, and that the tenant denied the forfeiture, and put the landlord to an action of ejectment to recover the land before the lease expired, which action was pending and being resisted by the tenant when the landlord brought an action of trover against the said tenant to recover for the conversion of timber wrongfully severed, do not tend to show that the tenant held the land adversely to the landlord; and the exclusion of such evidence in the action of trover is not erroneous, and affords no ground of complaint to the defendant therein. *Ib.* 111.

LANDLORD AND TENANT—*Continued.*

3. *The lease competent evidence in an action of trover by landlord against tenant.*—In an action of trover by the landlord against his tenant, pending the lease, for the conversion of timber wrongfully cut from the demised premises, it is competent for the landlord to introduce in evidence the lease that was current at the time such suit was brought, as showing that the defendant's possession was not adverse to the plaintiff. *Ib.* 111.
4. *Same.*—The fact that part of the lease so introduced in evidence might be looked to by the jury to determine what were the stipulations of a previous lease between the same parties in a certain particular, furnishes no ground for the exclusion of the lease, or the part specially objected to; and the fact that the provision singled out tends to contradict the oral testimony of defendant, of itself, makes the overruling of the motion correct. *Ib.* 111.
5. *Measure of damages in trover for conversion of wood.*—In an action of trover for the conversion of wood wrongfully cut from the leased premises, the measure of damages is the value of the wood at the time of the conversion, with interest to the time of trial. *Ib.* 111.
6. *Burden of proof as to release of cause of action.*—In an action of trover by the landlord against the tenant for the conversion of wood wrongfully cut from the rented premises, where the tenant claims that the landlord had released the cause of action, the burden of proving such release is upon the tenant. *Ib.* 111.
7. *Landlord's acceptance of rent not a release for conversion of wood by tenant.*—While the facts that the acceptance by the landlord of rent from his tenant, for a period subsequent to the wrongful severance of trees from the leased premises and the conversion thereof by the tenant, and that the landlord executed a new lease for a subsequent time, may amount to a waiver of the forfeiture of the lease current at the time of the severance, they do not operate as a release of the tenant's liability for the wood wrongfully severed and converted by him. *Ib.* 111.
8. *Charges invasive of the province of the jury.*—In an action of trover for the conversion of timber wrongfully cut from the leased premises, a charge instructing the jury that if they believe from the evidence that the defendant cut down the trees and converted them under the belief that he had the right to do so under the lease, they "should fix the value of the wood at the place it was cut, after deducting the cost of cutting the same, and after deducting the cost of hauling the same," is properly refused as being invasive of the province of the jury. *Ib.* 111.
9. *Landlord's lien; can be enforced independently of attachment.*—A lien secured to the landlord of a storehouse, dwelling house, or other building by section 3069 of the Code of 1886, can be enforced independently of the remedy by attachment given in section 3070 of the Code. *Carmen & Begg v. Ala. Nat. Bank*, 189.
10. *Attachment; resort thereto no bar to bill by landlord to enforce his lien.*—The remedy by attachment being cumulative, a resort to that writ for the enforcement of rent already matured, is no bar to a suit in equity by a landlord to enforce his lien against the proceeds of sale under attachment, issued at the instance of other creditors of the tenant, for the rent not matured. *Ib.* 189.
11. *Action on the case; destroying landlord's lien.*—An action on the case will not lie against one who, with notice of a landlord's lien, receives from the tenant property subject to said lien, unless it appears that he has disposed of the property or its proceeds, so that the lien can not be enforced against either. *Ehrman v. Oates*, 604.
12. *Same; averment of complaint.*—When, in an action on the case to

LANDLORD AND TENANT—*Continued.*

recover damages for the taking by defendant of cotton or its proceeds, on which the plaintiff alleged that he had a landlord's lien, there is no averment in the complaint that the defendant has converted or removed the cotton or its proceeds, so that the lien can not be enforced thereupon, such complaint is defective and subject to demurrer. *Ib.* 604.

LEASE.

1. *Lease of one railroad company by another.*—Under the general law, in the absence of special statutory authority, one railroad corporation has no power to lease its road or other property to another railroad corporation. *George v. Cen. R. R. & B. Co.*, 607.
2. *Same; when contrary to statutory provisions; equity of bill for cancellation.*—Under the statutory provisions of this State (Code, § 1588), a railroad corporation can lease its road and property to another railroad company that is continuous or connected with it by the performance by each of the companies of the requirements of said section; but a lease executed by two such railroad companies is invalid, which, while reciting that it was executed by the directors of each company, does not recite that the stockholders' meeting of one of the companies was called by its directors at a time and place, and in the manner designated by them, and in reference to the other company its recitals fail to show that the lease was assented to by a majority in value of the stockholders, represented in person or by proxy at a meeting called by the directors, at such time and place, and in such manner as they might designate; and a bill filed by the stockholders of one of the railroad corporations, seeking the cancellation of said lease, which is made an exhibit to their bill, is not demurrable on the ground that said lease was valid and not contrary to law. *Ib.* 607.

LICENSES.

1. *Bill to set aside fraudulent conveyance; not demurrable for failure to aver that defendants were not licensed to sell liquors, which form part of consideration of complainants' debt.*—A bill filed by creditors seeking to set aside as fraudulent and void a conveyance by their debtor to other creditors, which avers that a part of the consideration of the debt sought to be enforced was spirituous, vinous or malt liquors, is not subject to demurrer because it fails to aver that the complainants were licensed to make said sales; the *prima facie* presumption of the law being that they had complied with the revenue statutes, and taken out the required license. *O'Neil v. Birmingham Brewing Co., et al.*, 383.

LIENS.

1. *Lien of corporation on stock.*—Section 1874 of the Code of 1886, which provides that "all private corporations have a lien on the shares of its stockholders, for any debt or liability incurred to it by a stockholder, before notice of the transfer, or of a levy of such shares," confers the lien therein provided to secure debts which had been contracted before its enactment, as well as those contracted afterwards. *Birmingham Trust & Savings Co. v. East Lake Land Co.*, 304.
2. *Enforcement by a corporation of a lien under section 1874; no action by directors necessary.*—In order that a corporation may enforce the lien given it by statute, (Code, § 1874), against a stockholder to collect a past due indebtedness from him, there is, *prima facie*, no action necessary on the part of the directors; and the

LIENS—*Continued.*

- avermnt in the bill filed by a stockholder to enjoin the sale of his stock to collect a debt fixed by contract, that the directors of the corporation have taken no action to authorize the threatened sale, can not give the bill equity. *Elliott v. Sibley, et al.* 544.
3. *Action on the case; destroying landlord's lien.*—An action on the case will not lie against one who, with notice of a landlord's lien, receives from the tenant property subject to said lien, unless it appears that he has disposed of the property or its proceeds, so that the lien can not be enforced against either. *Erhman v. Oates, 604.*
 4. *Same; averment of complaint.*—When, in an action on the case to recover damages for the taking by defendant of cotton or its proceeds, on which the plaintiff alleged that he had a landlord's lien, there is no averment in the complaint that the defendant has converted or removed the cotton or its proceeds, so that the lien can not be enforced thereupon, such complaint is defective, and subject to demurrer. *Ib. 604.*
 5. *Landlord's lien; can be enforced independently of attachment.*—A lien secured to the landlord of a storehouse, dwelling house, or other building by section 30 9 of the Code of 1886, can be enforced independently of the remedy by attachment given in section 3070 of the Code. *Carmen & Begg v. Ala. Nat. Bank, 189.*
 6. *Attachment; resort thereto no bar to bill by landlord to enforce his lien.*—The remedy by attachment being cumulative, a resort to that writ for the enforcement of rent already matured, is no bar to a suit in equity by a landlord to enforce his lien against the proceeds of sale under attachment, issued at the instance of other creditors of the tenant, for the rent not matured *Ib. 189.*

See MECHANIC'S LIENS and VENDOR AND PURCHASER.

LIMITATION OF ACTIONS.

1. *Commencement of a suit; suing out a summons.*—A summons is not sued out so as to be the commencement of a suit (Code, § 2631), until it passes from the hands of the clerk, properly signed by him, to the sheriff or other proper officer to be executed, or is sent by mail or otherwise to such officer with a *bona fide* intention to have it served. *West v. Engel, 509.*

MAINTENANCE.

1. *Maintenance; subordinate possession by vendor.*—Where one, who is in possession of lands under a contract of purchase, executes a mortgage thereon, a conveyance of said lands under a foreclosure sale as provided in said mortgage, and a deed from such purchaser to another are not void for maintenance as against the original owner, who, after the death of his vendee under the contract of sale, took possession of the lands and received the rents therefrom; the possession of the lands and the pernanacy of the rents by the original owner and vendor being presumed to be subordinate to the equitable title of his vendee's mortgagee and those claiming under him. *Ashurst v. Peck, 499.*

MALICIOUS PROSECUTION.

1. *Malicious prosecution; advice of magistrate issuing warrant as a defense.*—In an action for malicious prosecution, the fact that the defendant in instituting the prosecution acted under the advice of the magistrate issuing the warrant, who was also a practicing attorney, does not constitute a valid defense. (COLEMAN, J., dissenting.) *Marks & Co. v. Hastings, 165.*

MALICIOUS PROSECUTION—*Continued.*

2. *Evidence; admissibility of telegrams, and of statements by the defendant.*—In an action for malicious prosecution, telegrams by plaintiff's employers to defendant, to induce him to abandon the prosecution, and declarations by defendant on being shown the telegrams, that he would not withdraw the criminal proceedings, that he wanted the warrant executed, that plaintiff was a thief, and he would not dismiss the prosecution, are admissible as tending to show the zeal and motive of the defendant in the prosecution. *Ib.* 165.
3. *Irrelevant evidence; number of persons present when plaintiff arrested.*—In an action for malicious prosecution, evidence as to the number of persons present when the officer went to arrest the plaintiff is irrelevant and inadmissible, the defendant not being responsible for any abuse in the manner of making the arrest, which was not directed by, participated in, or subsequently approved by him. *Ib.* 165.
4. *Charge as to the assessment of damages; when erroneous.*—In an action for malicious prosecution, an instruction to the jury that, if the prosecution was instituted maliciously and without probable cause, the jury might find for the plaintiff, and assess damages in such an amount as they determine the plaintiff was entitled to, without direction as to the elements of damages or the principles by which the jury's discretion should be governed, is erroneous and should not be given. *Ib.* 165.
5. *General affirmative charge.*—In an action for malicious prosecution against two defendants, where the evidence is conflicting as to the liability against one of them, the general affirmative charge for the defendants is properly refused, although a similar charge, applicable to the other defendant, might have been correct. *Ib.* 165.
6. *Charge to the jury; right of defendant to dismiss prosecution.*—In an action for malicious prosecution, where the evidence shows that the defendant refused to withdraw the prosecution, a charge to the jury that defendant had no authority to dismiss the prosecution is abstract and erroneous, since the prosecutor could have dismissed the prosecution by permission of the court. *Ib.* 165.
7. *Liability of one partner for the arrest of a person by his co-partner.*—One partner is not liable for the arrest or prosecution of another person by his co-partner, on a charge of larceny of partnership property, unless he advises or directs it, or participates therein, and he is then liable only in his individual capacity. *Ib.* 165.

MANDAMUS.

1. *Adjudication by a judge of his own incompetency not conclusive.*—The adjudication by a judge of his own incompetency to hear and determine a cause, and the entry of this conclusion on the record of his court, is not determinative or conclusive of the inquiry of incompetency *rel non*, on application for *mandamus*, or on appeal. *Medlin v. Taylor*, 239.
2. *Incompetency of a judge; how determined on application for mandamus, and on appeal.*—When application is made to the circuit judge for a writ of *mandamus*, to compel the judge of probate to hear and determine a certain cause, which he has adjudged himself incompetent to try, it is the duty of the circuit judge to determine the question of incompetency upon the facts disclosed, regardless of any adjudication made thereon by the judge whose incompetency is at issue; and a like duty devolves upon this court on appeal from the *mandamus* proceedings. *Ib.* 239.
3. *When mandamus the proper remedy.*—When the sheriff or jailor seeks to be reimbursed for money paid for the hire of a servant

MANDAMUS—*Continued.*

to keep up the fires in the county jail, and to supply the jail with water, his claim must be presented to the court of county commissioners, and upon their failure to allow it, his remedy is by *mandamus*, to compel said court to make the proper appropriation. *Marengo County v. Lyles*, 423.

4. *Mandamus to compel auditor to draw warrant for counties' shares of surpluses in state treasury from solicitors' fees.*—After adjustment and ascertainment of the surplus of solicitors' fees in the state treasury, over and above the salaries paid solicitors, as provided by act of February 28, 1887, (Acts 1886-87, p. 16.), the auditor must draw his warrants on the treasurer in favor of the counties, respectively, for the several sums ascertained to be due them; and upon his refusal to do so, he may be compelled there-to by *mandamus*. *Purifoy v. Andrews*, 643.

MASTER AND SERVANT.

1. *Negligence in not providing and maintaining safe place for employé to work*—An employer must provide and maintain a safe place for its employés to work while engaged in the discharge of their duties; but where a repairer and an engineer in charge of the engine to be repaired have performed the duties imposed upon them, respectively, by providing a place of safety for repairing the engine, and the employer has met the requirement imposed upon it to maintain the safety of the place while the work of repairing was being done, by employing a competent engineer who was present to preserve the safe condition of the place, the employer has performed its full duty to provide and maintain a place of safety for the repairer to do his work, and it can not be held responsible by the repairer under section 2589 of the Code for any failure on the part of the engineer to keep the place in a safe condition; such failure being the negligence, not of the employer, but of a fellow servant of the repairer. *Dantzler v. DeBardleben C. & I. Co*, 309.
2. *Action for death of employé; when not maintainable under sub-section 4 of section 2590 of the Code.*—When it is shown that an employé did not come to his death as a proximate result of having, in the discharge of his duties, gone into the place where he was killed, but by the supervening negligence of another or through an unaccountable accident, the personal representative of such employé cannot recover damages from the employer under sub-section 4 of section 2590 of the Code, on the ground that his intestate suffered death in consequence of his going to and being in the place where he was killed by the direction of one in the employment of defendant, whose orders he was bound to obey. *Ib.* 309.
3. *Same.*—If obedience by plaintiff's intestate to the orders of his superior is shown to bear the relation of proximate cause to his death, in order to hold the employer responsible under sub-section 4 of section 2590 of the Code, it must be further shown by the evidence that the superior was negligent in giving the order. *Ib.* 309.
4. *Engineer not a superintendent.*—An engineer, actually operating an engine with his own hands and with the aid of a helper as directed by persons superior to him in their common employment, is not a person "who has any superintendence entrusted to him," so as to make the employer responsible to a person for the negligence of the engineer under sub-section 2 of section 2590 of the Code. *Ib.* 309.
5. *Contract of hiring; right of employer when satisfaction guaranteed.* A contract of hiring by which the employé "guarantees to give

MASTER AND SERVANT—*Continued.*

satisfaction," invests the employer with full power to determine whether the labor performed is satisfactory, and the reasonableness of the grounds of dissatisfaction can not be inquired into by a court in an action brought by the employé for the wages which would have accrued under said contract subsequent to his discharge. *Allen v. Mutual Compress Co.*, 574.

MECHANIC'S LIEN.

1. *Partial performance of work, and acceptance thereof; sufficient for establishment of a mechanic's and material-man's lien.*—Although a contract, as originally made, was not severable, and there could have been no recovery for work done under it, except upon full performance of the contract, still, if there has been a part performance of the contract, and the owner has accepted it in its approximately completed condition, and is using it for the objects for which it was built, the law implies a promise on his part to pay what the work done is reasonably worth, and the contractor is entitled to enforce this debt by a mechanic's and material-man's lien. *Florence Gas, El. Light & Power Co. v. Hanby*, 15.
2. *When right to a mechanic's and material-man's lien not affected by act of February 12, 1891.*—When a contract is entered into, and the work and materials for which a lien is sought to be enforced were done and supplied, and a bill to enforce such lien is filed, prior to the passage of the act of February 12, 1891, (Acts 1890-91, p. 578), providing for mechanic's and material man's lien, the right to the enforcement of such lien is not affected by said act. *Ib* 15.

MORTGAGES.

1. *Mortgage by joint owner after partition does not destroy equity in favor of his co-tenants.*—When, after the partition of lands, the title to which was acquired by descent, one of the heirs mortgages the share allotted to him, his mortgagees are charged with notice of equities existing in favor of the other heirs, to have the mortgagor's share applied first, in exoneration of the shares of his co-heirs, to the satisfaction of a prior mortgage executed by their ancestor on the common property for the benefit of such heir and mortgagor. *Austin v. Bean*, 133.
2. *Fraudulent conveyances; evidence on bill filed to set them aside.*—Where an insolvent debtor conveys lands to some of his creditors by a deed absolute in form, in alleged payment of a debt greatly less than the value of the lands, and the creditors subsequently convey the same lands to the wife of the debtor upon a recited cash consideration, greatly less than the value of the lands, and at the time of the latter conveyance the said creditors accounted to the debtor for the rents collected and taxes paid by them pending their possession, and offers to purchase said lands were referred to the debtor, who continuously claimed the ownership thereof, the deed to the creditors will be construed a mortgage, and upon a bill filed by other creditors of the said debtor for that purpose, both of the conveyances will be set aside as fraudulent and void. *Moog v. Barrow*, 209.
3. *Amendments to bill; not allowed when repugnant to the averments of the original bill.*—Where a bill in equity is filed by the assignee of a mortgage, seeking its foreclosure, an amendment by which new parties defendant are made, and the validity of the assignment to the complainant is assailed, and compensation from the assignors is sought to be recovered, by reason of alleged fraudulent misrepresentation, is variant from, and repugnant

MORTGAGES—Continued.

- to, the purposes for which the original bill was filed, and it can not be allowed. *Baker v. Graves*, 247.
4. *Cancellation of mortgage by mistake; application of a payment.*—Defendants owed complainants on a mortgage and on an open account, and, a payment having been made by defendants, the mortgage was surrendered, as complainants alleged, through a mistaken impression of one of their employes that the mortgage debt had been paid. Defendants testified that they called for a statement of their "mortgage account," and complainants' bookkeeper testified that they called only for a statement of their open account, which he furnished. There was no such account on complainants' books as a "mortgage account," and the amount paid by defendants was the exact amount of the open account. Defendants knew that the money paid by them was less than the mortgage debt. Complainants produced in evidence the statement of the open account which they claimed to have furnished, while defendants failed to produce the statement of the "mortgage account," which they alleged was furnished them. *Held*, that the payment was on the open account, and that the mortgage was surrendered by mistake. *Kent & Barnett v. Marks & Gayle*, 350.
 5. *Mortgage to foreign corporations; when not controlled by act approved February 28, 1887.*—The act approved February 8, 1887, "to give force and effect to section 4, Article XIV of the constitution," is a penal law, and a mortgage executed by a resident of this State to a foreign corporation on March 1, 1887, being executed within thirty days after the adjournment of the General Assembly, at which said act was passed, is not governed by its provisions, and not being violative of any other statute, is a valid and binding contract between the parties. *Ross v. N. E. Mortg. Sec. Co.*, 362.
 6. *Bill to cancel mortgage; offer to do equity.*—Before a court of equity will grant relief on a bill filed to have a mortgage declared void and cancelled as violative of constitutional and statutory provisions, the complainant must offer to do equity by refunding the money he has received under the mortgage; but an offer in such bill, that if the debt past due is "held valid in any event, complainant hereby offers and is able and willing and ready to pay the same," is not such an offer to do equity as the law requires. *Ib.* 362.
 7. *Same; requisites for foreclosure.*—Where a bill is filed by the mortgagor to have his mortgage declared void and cancelled, there can be no decree of foreclosure of said mortgage (in the absence of a cross-bill by the mortgagee, praying a foreclosure), unless the complainant in his bill offers to do equity, and submits himself to the authority and jurisdiction of the court; but an averment in the bill that, if "the court should ascertain that said mortgage is void, and should order a reference to the register to ascertain and report the amount due from the complainant to the respondent, he is ready and willing to pay the same," is neither such an offer to do equity, nor such a submission of the complainant to the authority and jurisdiction of the court as would justify a decree of foreclosure. *Ib.* 362.
 8. *Same; when decree of foreclosure erroneous.*—When, on a bill filed to have a mortgage executed on March 1, 1887, to a foreign corporation declared void and cancelled, as violative of section 4, Article XIV of the constitution and the act approved February 28, 1887, to give force and effect to this constitutional provision, there is no sufficient offer by complainant to do equity, or to submit himself to the authority and jurisdiction of the court, and the proof shows that the defendant has complied with the

MORTGAGES—Continued.

- requirements of the said constitutional and statutory provisions, at the time of making the loan and taking the mortgage to secure it, a decree of foreclosure should not be rendered, but the bill, being without equity, should be dismissed. *Ib.* 362.
9. *Conveyance absolute in terms; evidence necessary to declare it a mortgage.*—When parol evidence is relied upon to have a deed of conveyance of lands, absolute in its terms, declared a mortgage or security for a debt, or to have a resulting trust in lands declared, the evidence adduced must be clear and convincing. *Jordan et al. v. Garner et al.*, 411.
 10. *When deed absolute in form declared a mortgage.*—On a bill, filed for that purpose, a deed, absolute on its face, will be declared a mortgage, when it is shown that the complainant purchased the lands, and upon payment of three-fifths of the purchase price received from the vendor a bond for title, that defendant, under an agreement with complainant, advanced for him to the vendor the balance of the purchase money, for which amount, with agreed interest, complainant executed his note to defendant, which note was a continuing debt, that the vendor had no negotiation with the defendant for the sale of the land, but executed the deed to him by direction of complainant, in consideration of the payment by him for complainant of the balance due upon the land, which balance was greatly less than the true value of said land. *Hughes et al. v. McKenzie*, 415.
 11. *Building and loan association; forfeiture of borrower's stock.*—Where a building and loan association, duly incorporated under the laws of the State (Code, §§ 1553-1556), has, in the exercise of its charter powers, adopted by-laws providing for the forfeiture of the stock of a borrowing shareholder, if he fails for three months to pay the interest or premiums on his loan, or the regular monthly instalments due upon his stock, if a borrower, to secure a loan from such association, executes a mortgage on real estate and assigns his stock as collateral security, and stipulates that these by-laws should be a part of the loan contract, the said association has the right to declare forfeited the stock subscribed for by such borrower, upon default by him for three months or more in the payment of his dues; and upon such forfeiture the shareholder is not entitled to have the mortgage debt abated to the extent of the aggregate of the payments made by him on his stock subscription prior to his default. *Southern B. & L. Assn. v. Anniston L. & T. Co.*, 582.
 12. *Execution of mortgage by infant; ratification by payment of interest notes.*—Where a mortgage is executed by an infant as security for money loaned, the payment, after arriving at full age, of the interest notes as they mature, is a ratification of the voidable contract, which thereafter becomes a binding obligation. *Amer. Mortg. Co. v. Wright*, 658.
 13. *Mortgage to secure pre-existing debt a general assignment.*—Where an insolvent debtor mortgages all of his property to secure a pre-existing debt, and this mortgage is satisfied prior to its maturity by the sale of part of the goods and the procurement of money by the mortgagor from another person by a second mortgage conveying the same property, the first mortgage is declared to be a general assignment for the benefit of the debtor's creditors. (Code, § 1737), and the money received by the first mortgagee, in satisfaction of his mortgage, is a trust fund in his hands, subject to the claims of the mortgagee's creditors. *Anniston Carriage Works v. Ward*, 670.
 14. *Bill to have mortgage declared a general assignment; second mortgage not a necessary party.*—Where a bill is filed to have a mortgage executed by an insolvent debtor to secure a pre-existing

MORTGAGES—*Continued.*

debt declared a general assignment, the second mortgagee, from whom the debtor obtained money to satisfy the mortgage executed to the first mortgagee, is not a necessary party. *Ib.* 670

15. *Bill to redeem; multifariousness.*—A bill filed to redeem lands covered by several mortgages to the same defendant, and to have cancelled a deed executed by the sheriff under an execution sale, the judgment debt being paid, and to have cancelled a deed from the mortgagee defendant to his sister, which was made without consideration, is not multifarious, since the court having jurisdiction for one purpose will, upon proper proof, settle all questions necessary to the granting of the relief prayed. *Lyon v. Dees*, 700.
16. *Same; mortgage chargeable with proceeds from the sale of land.*—On a bill filed for redemption from various mortgages given to secure the same debt and for an accounting, the mortgagee is properly chargeable with the price of a part of the land sold under one of the mortgages, though a defective deed was made to the purchaser, and the latter had not paid the amount bid at the sale, when it appears that the conveyance was intended to operate as a deed, and the sale has been ratified by the mortgagor who is the complainant. *Ib.* 700.

MORTGAGEE AND MORTGAGOR.

1. *Mortgage by joint owner after partition does not destroy equity in favor of his co-tenants.*—When, after the partition of lands, the title to which was acquired by descent, one of the heirs mortgages the share allotted to him, his mortgagees are charged with notice of equities existing in favor of the other heirs, to have the mortgagor's share applied first, in exoneration of the shares of his co-heirs, to the satisfaction of a prior mortgage executed by their ancestor on the common property for the benefit of such heir and mortgagor. *Austin v. Bean*, 133.
2. *Right of purchaser at an execution sale.*—When, before the mortgage debt is paid, the mortgagor agrees to sell to a third person the lands conveyed in said mortgage, and after this agreement a judgment is recovered against the said mortgagor, and execution thereunder is levied upon the same lands, and the said lands are sold under this execution, after the execution of the deed in compliance with the agreement of sale, the purchaser at said execution sale acquires the equity of redemption, and as the holder of such equity, is entitled to the excess of the balance due the mortgagor paid by the one who purchases at a subsequent sale under the mortgage. *Troy et al. v. May*, 401.
3. *Building and loan association; forfeiture of borrower's stock.*—Where a building and loan association, duly incorporated under the laws of the State (Code, §§ 1553-1556), has, in the exercise of its charter powers, adopted by-laws providing for the forfeiture of the stock of a borrowing shareholder, if he fails for three months to pay the interest or premiums on his loan, or the regular monthly instalments due upon his stock, if a borrower, to secure a loan from such association, executes a mortgage on real estate and assigns his stock as collateral security, and stipulates that these by-laws should be a part of the loan contract, the said association has the right to declare forfeited the stock subscribed for by such borrower, upon default by him for three months or more in the payment of his dues; and upon such forfeiture the shareholder is not entitled to have the mortgage debt abated to the extent of the aggregate of the payments made by him on his stock subscription prior to his

MORTGAGEE AND MORTGAGOR—*Continued.*

default. *Southern Bldg. & Loan Asso. v. Anniston Loan & Trust Co.*, 582.

4. *Same*; mortgagee chargeable with proceeds from the sale of land.—On a bill filed for redemption from various mortgages given to secure the same debt and for an accounting, the mortgagee is properly chargeable with the price of a part of the land sold under one of the mortgages, though a defective deed was made to the purchaser, and the latter had not paid the amount bid at the sale, when it appears that the conveyance was intended to operate as a deed, and the sale has been ratified by the mortgagor who is the complainant. *Lyon v. Dees*, 700.

MUNICIPAL CORPORATIONS. See CORPORATIONS, SUB-TITLE

NEGLIGENCE.

I. NEGLIGENCE IN GENERAL.

1. *Averment of wanton or willful negligence not sustained by proof of simple negligence.*—An averment in the count of a complaint, that the injury complained of was caused by the wanton, reckless or willful negligence of the defendant, is not sustained by evidence of simple negligence; to authorize a recovery under such a count, it is necessary to prove the negligence as averred. *L. & N. R. R. Co. v. Hurt*, 34.
2. *Evidence of reckless, wanton or willful negligence can be introduced in a complaint which avers simple negligence.*—Evidence of reckless, wanton or willful negligence can be introduced on the trial of a cause in which the complaint avers only simple negligence; and whether the evidence thus introduced was sufficient to authorize the plaintiff to recover, notwithstanding he may have been guilty of contributory negligence, is a question for the jury. *Ib.* 34.
3. *Engineer's right to presume compliance with the statute by the employes of an intersecting road.*—An engineer when approaching a crossing has a right to presume that the employes upon a train on an intersecting road will comply with the statute, and stop their train within one hundred feet of the crossing; and when, in an action against a railroad for the killing of an engineer on an intersecting road caused by a collision at the crossing, it is shown that the employes upon the defendant's train, when approaching the crossing, failed to stop within the distance required by law, it will be presumed, without further evidence, that the injury was caused by the negligence of the defendant. *Birmingham Min. R. R. Co. v. Jacobs*, 149.
4. *Duty of engineer when approaching a railroad crossing.*—Although the engineer on an engine of a railroad having the older right of way can presume, when approaching a crossing, that the employes of a train on the intersecting road will stop their train as required by law, it is his duty to keep a lookout for approaching trains; and if, in the face of facts reasonably indicating that the approaching train on the intersecting road is not going to stop at said crossing the engineer attempts to cross, he is chargeable with negligence. *Ib.* 149.
5. *Question of negligence submitted to the jury.*—In an action against a railroad to recover damages for injuries alleged to have been sustained, by reason of negligence, the questions, whether the damage complained of was occasioned entirely by the negligence of the defendant or its employes, or whether the plaintiff by his own negligence so far contributed to his own misfortune, that but for such contributory negligence on his part the injury complained of would not have been inflicted, are for the de-

PARENT AND CHILD—*Continued.*

times a day, and who permits his child of tender years to play by itself in his yard, with no one to attend or nurse it and keep it from going upon the track of the railroad, when he knows a train is soon to pass, is guilty of such negligence as will preclude him from recovering damages from the railroad company for killing his child which had gone upon its track, unless the railroad company is guilty of more than simple negligence. *A. G. S. R. R. Co. v. Dobbs, 219.*

2. *Negligence; when question for the jury.*—In an action against a railroad company by parent for alleged negligent killing of his child, the question whether the engineer on the train causing the injury promptly used all available appliances, after seeing the child on the track, to stop the train before reaching it, is one for the jury, when the evidence is in conflict, or furnishes ground for conflicting inferences. *Ib. 219.*
3. *Action against railroad company for negligent killing; when special plea sets up complete defense.*—In an action by parent against a railroad company for alleged negligent killing of his child, a complete defense is set up by a special plea which avers that the accident did not occur at a public crossing, that the engineer in charge of the locomotive at the time of the injury was a skillful and careful man, who was, at the time of and before the accident, keeping a vigilant and proper lookout, and doing all things required by law to avoid an injury to person or property, that the engine was supplied with all the improvements and appliances to secure safety in its operation and to avoid injury, that the cars of the train had all necessary appliances, and were manned with a sufficient number of skillful and careful brakemen, and that the child could not, by proper and vigilant lookout, have been seen until it came upon the track so suddenly and in such close proximity to the engine that the employment of all means known to skillful and careful engineers could not have avoided the injury. *Ib. 219.*
4. *Same.*—In an action against a railroad company for killing plaintiff's child, where one count of the complaint assigns as the actionable negligence that the engineer of the defendant did not use all the means within his power, known to skillful and careful engineers, to stop the train after the discovery of the child upon the track, a plea to such count that avers that the child came upon the track so suddenly and in such close proximity to the engine that the employment of all means in the power of the engineer, known to careful and skillful engineers, could not have avoided the injury, that the engine and cars were supplied with all necessary improvements and machinery and were sufficiently manned, and that defendant's employes were, at the time, keeping a vigilant lookout and could not have discovered the child before it came upon the track, presents a complete defense, and is not demurrable. *Ib. 219.*
5. *Same.*—Where, in such action, the negligence complained of in one count was that the defendant failed to provide proper brakes and appliances for stopping the train, a complete defense is presented by a plea that avers that, at the time of the accident, the engine and cars had all the appliances and machinery known to skillful engineers and railroad operators, and were properly manned, that the child was discovered as soon as possible while keeping a vigilant lookout, and that every thing in the power of skillful engineers and brakemen was done to avoid the injury after the child was discovered. *Ib. 219.*
6. *Same.*—In an action by a parent for the alleged negligent killing of his child, where one of the counts of the complaint bases

PARENT AND CHILD—*Continued.*

the actionable negligence of the defendant on the failure of the engineer to blow his whistle or ring the bell before entering or leaving a station on the road of the defendant, a quarter of a mile from the place of the accident, no defense to such count is presented by pleas, which aver that the child came on the track in such close proximity to the engine that the injury could not have been avoided by the employment of all means in the power of the engineer, although the engine and train had all necessary appliances known to skillful engineers and railroad operators, were properly manned, and every thing possible was done to avoid the injury after the child was discovered. *Ib.* 219.

7. *Charges to the jury.*—In an action by a parent against a railroad company for killing his child, if based on the tendency of the evidence adduced, it is a proper instruction to the jury to charge them that, "If the engineer did all in his power to avert the accident, but any one of the brakemen was negligent in the discharge of his duties, then the negligence of such brakeman is by law attributed to defendant; and if the jury further find that such negligence proximately caused the injury complained of, then the jury should find a verdict for plaintiff, unless they further find that the plaintiff has been guilty of contributory negligence." *Ib.* 219.
8. *Charge defining negligence.*—In an action against a railroad company for alleged negligent killing of plaintiff's child, a charge that defines negligence as consisting "either in doing what a man of ordinary intelligence, care and prudence ought not to do, or in omitting to do what a man of ordinary intelligence, care and prudence ought to have done," and then instructs the jury that "if the plaintiff was guilty of either of these kinds of negligence and thereby contributed proximately to produce the injuries" complained of, the jury ought to find a verdict for the defendant, is erroneous, in ignoring the consideration of willful, wanton or intentional negligence on the part of defendant's employes, and is properly refused. *Ib.* 222.
9. *Charge as to duty of plaintiff, in an action against a railroad.*—In an action against a railroad company for the alleged negligent killing of plaintiff's child, the court properly refused a charge which instructed the jury that the law required the plaintiff to observe such prudent care in protecting his child and keeping it from going into dangerous places, as a reasonably prudent man would observe under like circumstances, and if the plaintiff did not observe such care, and "such omissions of care contributed in the slightest degree to the injury of the child, then, in such case, the verdict of the jury must be for the defendant, although the defendant may have been guilty of simple negligence." Such instruction ignores the consideration of willful, wanton or intentional negligence, and makes the slightest degree of negligence on the part of the plaintiff the equivalent of contributory negligence. *Ib.* 222.
10. *Same.*—In such an action a charge is properly refused that instructs the jury that, if the evidence of the plaintiff raises a presumption that he was guilty of such acts of negligence in the care of his child as contributed in any degree to its injuries, "then, the burden of proof is upon the plaintiff to show he was not guilty of such negligence as contributed in the slightest degree to the injury of the child, and if the jury are reasonably satisfied the plaintiff has not done this, then the verdict must be for the defendant, although the jury may believe the defendant was guilty of simple negligence." Such charge not only ignores the consideration of any willful, wanton or intentional

PARENT AND CHILD—*Continued.*

negligence, but erroneously defines contributory negligence.
Ib. 223.

PARTITION.

1. *Partition; co-tenant not estopped thereby from asserting equities against existing mortgage.*—When there exists a mortgage on joint property to secure a debt of one of the co-tenants, a partition of the common property by decree of the probate court does not estop the other co-tenants from asserting their equity to have the share allotted to their joint owner sold first to pay such debt, in exoneration of the shares allotted to them. *Austin v. Bean*, 133.
2. *Same; co-tenant not estopped from asserting equity by exchange of her share by warranty deed.*—The fact that one of the joint owners of common property, immediately after the partition of said lands by decree of the probate court, conveyed the share allotted to her by warranty deed, in exchange for the share of one of her co-tenants, does not estop her from the assertion of her equity to have the share so exchanged sold first, to satisfy a mortgage existing upon the whole property, given to secure a debt of her said co-tenant, the mortgage having been executed prior to the acquisition of title by the co-tenants. *Ib.* 133.
3. *Purchaser from an heir; charged with notice of equity in favor of other heirs.*—The purchaser of land from one who derives title by descent from his father, is charged with notice of any equity existing in favor of the ancestor, or the co-heirs of the grantor, affecting the land in its descent. *Ib.* 133.
4. *Mortgage by joint owner after partition does not destroy equity in favor of his co-tenants.*—When, after the partition of lands, the title to which was acquired by descent, one of the heirs mortgages the share allotted to him, his mortgagees are charged with notice of equities existing in favor of the other heirs, to have the mortgagor's share applied first, in exoneration of the shares of his co-heirs, to the satisfaction of a prior mortgage executed by their ancestor on the common property for the benefit of such heir and mortgagor. *Ib.* 133.
5. *Sale of homestead for distribution; when owned jointly by husband and wife can not be made against the wife's objections.*—When a homestead is owned jointly by husband and wife, the probate court can not, upon petition by the husband, decree a sale thereof for distribution against the wife's objections. *Mitchell v. Mitchell*, 183.
6. *Same.*—The fact that at the time of the filing of the petition by the husband for the sale, for distribution, of the homestead owned jointly by husband and wife, the said husband and wife were living separate and apart, does not give the probate court the right to order a sale of the homestead, against the objection of the wife. So long as the relation of husband and wife exists, the home of the husband is deemed to be the home of the wife. *Ib.* 183.
7. *Sale of lands for distribution; burden of proof.*—Land can not be sold for distribution except upon satisfactory proof that it can not be partitioned without the sale; and the burden rests upon the petitioner to make this proof. *Ib.* 183.

PARTNERSHIP.

1. *Liability of one partner for the arrest of a person by his co-partner.*—One partner is not liable for the arrest or prosecution of another person by his co-partner, on a charge of larceny of partnership property, unless he advises or directs it, or participates therein,

PARTNERSHIP—*Continued.*

and he is then liable only in his individual capacity. *Marks v. Hastings*, 165.

2. *Suit in equity against a partnership; married woman being a partner no defense to a bill, and does not invalidate a contract made by the firm.*—Where the sole purpose of a bill, filed to cancel as fraudulent a conveyance by a partnership, is to subject to the satisfaction of complainants' demand the assets of said partnership, it is no objection to said bill that one of the partners is a married woman, nor does such a fact destroy the binding obligation of the contracts by which the firm became indebted to the complainants. *O'Neil, v. Birmingham Brewing Co.*, 383.
3. *Accounting and settlement of a partnership; when a reference is properly decreed.*—A bill was filed for an accounting between partners, and a settlement of the partnership after dissolution. The averments of the bill were not as definite as good pleading required, and no objection was made to the bill on this account; but respondent, in his answer, alleged that the partnership matters were so conducted that it was impossible to state an account approximately correct. The only evidence on this question was the testimony of the parties themselves, which, in some respects was irreconcilable. *Held*, that a decree ordering a reference was not erroneous, since upon such reference other evidence might be introduced, and a decree of confirmation would not be refused if the evidence taken upon the reference clearly shows a balance in favor of one partner; although it was impossible to make an absolutely correct statement of the account. *Costello v. Montague*, 426.

PAYMENTS.

1. *Application of a payment on a debt; right of creditor in absence of specific direction.*—A debtor may, at the time of payment, direct its application; but if, at the time of payment, he is indebted to the same creditor in two separate accounts, and fails to give any direction as to how the said payment shall be applied, the creditor has the right to apply it to either one of his debts; and when so applied, at the time of payment, both parties are bound by such application, which can not be changed except by mutual consent. *Kent & Barnett v. Marks & Gayle*, 350.
2. *Burden of proving specific direction.*—The burden of proving an alleged specific direction as to the application of a payment upon a debt to a creditor, is upon the debtor who affirms such special direction. *Ib.* 350.
3. *Cancellation of mortgage by mistake; application of a payment.*—Defendants owed complainants on a mortgage and on an open account, and, a payment having been made by defendants, the mortgage was surrendered, as complainants alleged, through a mistaken impression of one of their employes that the mortgage debt had been paid. Defendants testified that they called for a statement of their "mortgage account," and complainants' bookkeeper testified that they called only for a statement of their open account, which he furnished. There was no such account on complainants' books as a "mortgage account," and the amount paid by defendants was the exact amount of the open account. Defendants knew that the money paid by them was less than the mortgage debt. Complainants produced in evidence the statement of the open account which they claimed to have furnished, while defendants failed to produce the statement of the "mortgage account," which they alleged was furnished them. *Held*, that the payment was on the open account, and that the mortgage was surrendered by mistake. *Ib.* 350.

PLEADING AND PRACTICE.

1. *When an appellate court reviews an action of the trial court upon the admissibility of evidence.*—To justify a review by the appellate court of a ruling by the trial court upon the admissibility of evidence, the record must show affirmatively that the trial court made a ruling, which was excepted to at the time, or that counsel called attention to the question and requested a ruling upon it, which the trial court failed or refused to make, and that counsel making the request then and there reserved an exception to the court's failure or refusal to make such ruling. *Tenn. River Transp. Co. v. Kavanaugh Bros.*, 1.
2. *Rulings upon the evidence; error without injury.*—Where competent evidence, which has been erroneously excluded, is afterwards introduced on renewed inquiry, the error of its former exclusion is cured, and becomes error without injury. *Ib.* 1.
3. *Averment of wanton or willful negligence not sustained by proof of simple negligence.*—An averment in the count of a complaint, that the injury complained of was caused by the wanton, reckless or willful negligence of the defendant, is not sustained by evidence of simple negligence; to authorize a recovery under such a count, it is necessary to prove the negligence as averred. *L. & N. R. R. Co. v. Hurt*, 34.
4. *Evidence of reckless, wanton or willful negligence can be introduced in a complaint which avers simple negligence.*—Evidence of reckless, wanton or willful negligence can be introduced on the trial of a cause in which the complaint avers only simple negligence; and whether the evidence thus introduced was sufficient to authorize the plaintiff to recover, notwithstanding he may have been guilty of contributory negligence, is a question for the jury. *Ib.* 34.
5. *Action on a note; proper parties plaintiff.*—In an action on a promissory note, when the plaintiffs are the parties to whom payment may be legally made, and who can legally discharge the debtor or maker, suit is properly brought in their names, although the money when collected may not be for their use alone, but for the use of themselves and others, to whose use they are legally required to apply it. *Bibb v. Hall*, 79.
6. *Bills of exception no part of record; rulings on the pleading shown only therein will not be considered on appeal.*—A bill of exceptions is no part of the record of the trial court, and rulings on the pleading which are not shown by the record proper, but appear only in the bill of exceptions, will not be reviewed by the appellate court. *Brooks v. Rogers*, 111; *Heard v. Hicks*, 102.
7. *Objection to deposition; when too late.*—An objection to a deposition, which is not made before the trial is entered upon, and it is not shown that the ground of the objection transpired or became known to the party objecting only after the trial began, comes too late and is properly overruled.—*Brooks v. Rogers*, 111.
8. *Indefinite exceptions; not considered on appeal.*—It is the duty of the party excepting to the ruling of the trial court, to make clear to the appellate court the error insisted on; and if a question asked a witness is too indefinite to enable the court of appeal to determine whether it sought to elicit legal or illegal evidence, the assignments of error based on an exception the ruling of the trial court on such question will not be considered. *Claffin & Co. v. Rodenberg*, 211.
9. *Error without injury; benefit of defense under general issue.*—Although the court may have committed error in sustaining demurrers to a special plea, it is error without injury, if the defendant had the benefit of the same facts as a defense under the plea of the general issue. *A. G. S. R. R. Co. v. Dobbs*, 219; *Russell v. Jones*, 261.

RAILROADS—*Continued.*

- that the employment of all means known to skillful and careful engineers could not have avoided the injury. *Ib.* 219.
13. *Same.*—In an action against a railroad company for killing plaintiff's child, where one count of the complaint assigns as the actionable negligence that the engineer of the defendant did not use all the means within his power, known to skillful and careful engineers, to stop the train after the discovery of the child upon the track, a plea to such count that avers that the child came upon the track so suddenly and in such close proximity to the engine that the employment of all means in the power of the engineer, known to careful and skillful engineers, could not have avoided the injury, that the engine and cars were supplied with all necessary improvements and machinery and were sufficiently manned, and that defendant's employes were, at the time, keeping a vigilant lookout and could not have discovered the child before it came upon the track, presents a complete defense, and is not demurrable. *Ib.* 219.
 14. *Same.*—Where, in such action, the negligence complained of in one count was that the defendant failed to provide proper brakes and appliances for stopping the train, a complete defense is presented by a plea that avers that, at the time of the accident, the engine and cars had all the appliances and machinery known to skillful engineers and railroad operators, and were properly manned, that the child was discovered as soon as possible while keeping a vigilant lookout, and that every thing in the power of skillful engineers and brakemen was done to avoid the injury after the child was discovered. *Ib.* 219.
 15. *Same.*—In an action by a parent for the alleged negligent killing of his child, where one of the counts of the complaint bases the actionable negligence of the defendant on the failure of the engineer to blow his whistle or ring the bell before entering or leaving a station on the road of the defendant, a quarter of a mile from the place of the accident, no defense to such count is presented by pleas, which aver that the child came on the track in such close proximity to the engine that the injury could not have been avoided by the employment of all means in the power of the engineer, although the engine and train had all necessary appliances known to skillful engineers and railroad operators, were properly manned, and every thing possible was done to avoid the injury after the child was discovered. *Ib.* 219.
 16. *Same.*—Such pleas constitute a sufficient answer to a count in the complaint which avers "that said killing was caused by the negligence of the defendant's employes in the management or running of said train of cars." *Ib.* 219.
 17. *Charges to the jury.*—In an action by a parent against a railroad company for killing his child, if based on the tendency of the evidence adduced, it is a proper instruction to the jury to charge them that, "If the engineer did all in his power to avert the accident, but any one of the brakemen was negligent in the discharge of his duties, then the negligence of such brakeman is by law attributed to defendant; and if the jury further find that such negligence proximately caused the injury complained of, then the jury should find a verdict for plaintiff, unless they further find that the plaintiff has been guilty of contributory negligence." *Ib.* 219.
 18. *Charge defining negligence.*—In an action against a railroad company for alleged negligent killing of plaintiff's child, a charge that defines negligence as consisting "either in doing what a man of ordinary intelligence, care and prudence ought not to

RAILROADS—Continued.

- do, or in omitting to do what a man of ordinary intelligence, care and prudence ought to have done," and then instructs the jury that "if the plaintiff was guilty of either of these kinds of negligence and thereby contributed proximately to produce the injuries" complained of, the jury ought to find a verdict for the defendant, is erroneous, in ignoring the consideration of willful, wanton or intentional negligence on the part of defendant's employes, and is properly refused. *Ib.* 219.
19. *Charge as to contributory negligence.*—In an action against a railroad company to recover damages for personal injuries, it is proper to refuse a charge which instructs the jury that, "If the plaintiff by ordinary care could and would have avoided the injury of which he complains of, and if by his failure to exercise such ordinary care he contributed proximately to produce the injury of which he here complains, then, upon this state of facts, the jury ought to find a verdict for the defendant, although they may believe all the evidence as to any alleged negligence of the conductor, engineer or brakeman." Such charge ignores the consideration of any willful, wanton or intentional negligence by the defendant. *Ib.* 219.
 20. *Charge as to duty of plaintiff, in an action against a railroad.*—In an action against a railroad company for the alleged negligent killing of plaintiff's child, the court properly refused a charge which instructed the jury that the law required the plaintiff to observe such prudent care in protecting his child and keeping it from going into dangerous places, as a reasonably prudent man would observe under like circumstances, and if the plaintiff did not observe such care, and "such omissions of care contributed in the slightest degree to the injury of the child, then, in such case, the verdict of the jury must be for the defendant, although the defendant may have been guilty of simple negligence." Such instruction ignores the consideration of willful, wanton or intentional negligence, and makes the slightest degree of negligence on the part of the plaintiff the equivalent of contributory negligence. *Ib.* 219.
 21. *Same.*—In such an action a charge is properly refused that instructs the jury that, if the evidence of the plaintiff raises a presumption that he was guilty of such acts of negligence in the care of his child as contributed in any degree to its injuries, "then, the burden of proof is upon the plaintiff to show he was not guilty of such negligence as contributed in the slightest degree to the injury of the child, and if the jury are reasonably satisfied the plaintiff has not done this, then the verdict must be for the defendant, although the jury may believe the defendant was guilty of simple negligence." Such charge not only ignores the consideration of any willful, wanton or intentional negligence, but erroneously defines contributory negligence. *Ib.* 219.
 22. *Averments of negligence in a complaint.*—In an action against a railroad company to recover damages for personal injuries, inflicted by a mule driven by the plaintiff becoming frightened at the approach of one of defendant's trains, a complaint which alleges "that the mule became frightened at said engine and cars owing to the negligence of defendant's employes in the running and management of said engine and cars," contains a sufficient averment of negligence, and is not demurrable. *Oxford Lake Line Co. v. Stedham*, 376.
 23. *Escape of steam from railroad engine no cause of action.*—Where steam is necessarily allowed to escape from a railroad engine, in order to slacken the speed of the train, for the purpose of turning a sharp curve in the track, the company is not liable

RAILROADS—*Continued.*

- for injuries occasioned by a mule, driven on a public road running parallel to the railroad track, becoming frightened at the noise of the escaping steam and running away, provided the escape of steam was not more than was usual, and such as was necessarily incident to the control of the engine at that time, and was not recklessly or wantonly caused by the employes of the railroad company. *Ib.* 376.
24. *Section foreman of a railroad; his duties.*—A section foreman of a railroad is not a person in charge of a switch, within the meaning of subdivision 5 of section 259¹ of the Code of 1886, in the sense that it is his duty to see that it is properly opened or closed; his duty is rather that of a superintendent under subdivision two of said section, to superintend and see that the ways, works, machinery and plant are kept in order. *Birmingham R. & E. Co. v. Baylor.* 488.
 25. *Person in charge or control of a switch.*—If no person has been specially appointed to the duty of opening and closing a switch, and a spur track, connected with the main line of such switch, is in constant use in order that trains may pass each other, and the engineers and conductors are provided with keys to the switch for that purpose, such persons, *pro hac vice*, are in charge of the switch within the meaning of the statute. *Ib.* 488.
 26. *Action for negligence of persons in charge of switch; sufficiency of evidence to submit question to jury.*—Where in an action against a railroad company for personal injuries to an employé caused by a train going through an open switch, there is a count in the complaint charging negligence on the part of persons in the employ of the defendant, who had charge of the switch, in leaving it open, and there was evidence that the switch was provided with a suitable lock, that the section foreman, conductors and engineers each had a key, that the switch was used about 30 minutes before the accident, and the engineer then using the switch testified that it was properly secured before he left it, there was sufficient evidence to submit to the jury plaintiff's right to recover under such count. *Ib.* 488.
 27. *When averment of two acts of negligence constitutes but one cause of action; evidence to justify recovery under such count.*—Where in an action against a railroad by employé for injuries resulting from a train running into an open switch, it is averred in a count of the complaint that the injuries were caused by the negligence of defendant's employes, who had charge of the switch, in failing to properly secure it, and by the negligence of persons in defendant's employ, who had charge of the train, in failing to properly supply it with equipments for bringing it to a quick stop, by reason of which failures said switch did come open, such count contains but one cause of action, based upon the co-operating negligence of the two classes of persons; and without the proof of negligence of both there can be no recovery under the count. *Ib.* 488.
 28. *Action against railroad company; relevant evidence.*—In an action for injuries to a railroad employé caused by the train on which he was employed running through an open switch, where there was evidence that locks had been used on defendant's switches for six months and other evidence that a lock had never been put on the switch in question, the evidence of a witness that he was employed by defendant up to two months before the accident, and that there were then no locks in use on the road, is relevant and admissible. *Ib.* 488.
 29. *Same; conclusion of witness.*—In an action for injuries arising from a train running through an open switch, the engineer of the train which had been the last to pass through the switch

RAILROADS—*Continued.*

previous to the accident, can not testify that the switch was secure when he passed through it, without first stating its condition and how it was secured. *Ib.* 488.

30. *Lease of one railroad company by another.*—Under the general law, in the absence of special statutory authority, one railroad corporation has no power to lease its road or other property to another railroad corporation. *George, et al. v. Cen. R. R. & Bk. Co.*, 607.
31. *Same; when contrary to statutory provisions; equity of bill for cancellation.*—Under the statutory provisions of this State (Code, § 1586), a railroad corporation can lease its road and property to another railroad company that is continuous or connected with it by the performance by each of the companies of the requirements of said section; but a lease executed by two such railroad companies is invalid, which, while reciting that it was executed by the directors of each company, does not recite that the stockholders' meeting of one of the companies was called by its directors at a time and place, and in the manner designated by them, and in reference to the other company its recitals fail to show that the lease was assented to by a majority in value of the stockholders, represented in person or by proxy at a meeting called by the directors, at such time and place, and in such manner as they might designate; and a bill filed by the stockholders of one of the railroad corporations, seeking the cancellation of said lease, which is made an exhibit to their bill, is not demurrable on the ground that said lease was valid and not contrary to law. *Ib.* 607.
32. *Injunction against a railroad corporation voting stock in another railroad corporation.*—Where one railroad corporation has purchased a majority of the stock of another railroad corporation, with the intent and purpose of getting the management and control thereof, in order to defeat or lessen competition in the business of the two companies, or to encourage monopoly, and the corporation owning the majority of the other's stock violates duties in respect of the property and rights of the other company and its stockholders, committing willful wastes and subjecting said company to a multiplicity of suits, a court of equity will interfere, by an injunction at the suit of a minority of the stockholders, to restrain the said corporation owning the majority of the stock from the use of said stock in the management of the affairs of the other corporation and in the election of its officers. *Ib.* 607.
33. *Same; jurisdiction of court of equity notwithstanding property in the hands of a receiver.*—In a bill filed to enjoin a railroad corporation owning a majority of the stock in another railroad corporation from voting its stock in the management of the affairs of the latter company, and in the election of its officers, the jurisdiction of the court is not ousted, and the right to grant the relief prayed for is not affected, by the fact that the road whose stock is controlled by the other corporation is in the hands of a receiver, appointed by other courts. *Ib.* 607.
34. *Same; laches.*—Where a bill is filed by stockholders in a corporation to enjoin another corporation owning a majority of the stock of the former corporation from voting its stock in the control of the affairs and in the election of the officers of said corporation, the fact that the complainant stockholders, after full knowledge of the grounds of complaint alleged in their bill, or full opportunity to acquire such knowledge, acquiesced in the acts complained of for more than six years, does not debar them from having enjoined such use of the stock in the future. *Ib.* 607.

RAILROADS—Continued.

35. *Injunction against a corporation at suit of stockholders; previous request to directors for action*—A minority of the stockholders of a corporation can not maintain a bill in equity to prevent illegal action on the part of the majority, without a previous request to the proper officers to interfere, and their failure or refusal to do so; but when it is shown that a majority of the stock of said corporation is owned by another corporation, which practically creates and controls the managing and governing bodies of said corporation, the necessity for such a demand upon the governing body is dispensed with, as any such demand would be fruitless. *Ib.* 607.
36. *Action against a railroad company for killing cattle; negligence; when determined by the jury*.—Where, in an action against a railroad company for killing cattle, it is shown that the cattle were killed by defendant's train, and the testimony for the plaintiff tends to show that at the place of the killing the track was straight and the view unobstructed for a mile, while the testimony for the defendant was to the effect that the cattle were grazing a short distance from the track, and, when the train was a quarter of a mile from them, they showed no restlessness or disposition to move towards the track, and that when the train was close upon them they started upon the track whereupon the engineer, who had kept a steady lookout, used all the means within his power to stop the train, it is for the jury to determine whether the cattle killed came on the track so suddenly and near to the engine that the persons operating the train could not, by the exercise of reasonable care and diligence, prevent the injury; and the defendant is not, therefore, entitled to the general affirmative charge. *L. & N. R. R. Co. v. Rice*, 676.
37. *Same; charge to the jury*.—In such a case a charge that the jury must find for defendant, if they believed the defendant's evidence, is properly refused, since it confines the jury to the consideration of only a part of the testimony, when they should, in making up their verdict, consider all the evidence together. *Ib.* 676.
38. *Same*. The court properly charged the jury that, "To prove that the engineer was on the lookout at the time when he actually discovered the cattle, is not enough to show that he fully performed his duty. If he failed to discover the cattle sooner, when he might have done so, if he had kept a proper lookout prior to the actual discovery of the cattle, then the defendant is chargeable with negligence." *Ib.* 676.
39. *Same*.—A charge is properly refused, which instructs the jury that if the engineer saw the cattle a quarter of a mile before reaching them, when they were standing near, and indicating no intention of moving to the track, and would not probably have been injured where they were, he was under no further duty to look out for their safety. *Ib.* 676.
40. *Same*.—A charge that requires the plaintiff to prove negligence on the part of the defendant, committed prior to the time the cattle got upon the track, is properly refused, since, if the injury resulted from the negligence of defendant's employes, committed subsequently to the time the cattle got upon the track, the defendant is liable, although there may have been no negligence prior to that time. *Ib.* 676.

DUMMY RAILROADS.

41. *Dummy railroads subject to same rules as to use of safeguards and appliances as ordinary railroads*.—Corporations or persons operating dummy lines engaged in running both passenger and freight trains, that have regular stations and section foremen, and use engines capable of great speed, and which traverse a

RAILROADS—*Continued.*

large section of country, are required to observe the same rules and regulations and adopt and use such appliances and safeguards as are in use and deemed necessary by well regulated railroads of the ordinary character. (*Birmingham Ry. & Elec. Co. v. Allen*, 99 Ala. 359, followed.) *Birmingham Ry. & Elec. Co. v. Baylor*, 488.

RATIFICATION.

1. *Ratification of appointment.*—There can be no ratification by the appointing power of the prior appointment of a public officer; but if the person has been informally appointed, or one duly appointed has failed to qualify, the appointing power can only fill the vacancy *For v. McDonald*, 51.
2. *Acts and contracts of agents as binding corporation; ratification.*—In the ordinary dealings of construction and trading corporations, it is often impracticable for a company to speak and act through its governing body, and when acting through agents within the scope and purview of their chartered powers, the same intendments and implications arise, as spring out of similar actions or conduct of natural persons; and acts of a person assuming to represent such corporation, and transactions with him, in the line of the business of said corporation, even though without express authority, become binding on the corporation, if subsequently ratified by it, and such ratification may be made expressly or by mere acquiescence, or by a failure to repudiate the act, knowing it to have been done. *Bibb v. Hall*, 79.
3. *Unauthorized transfer of notes by officer of a corporation; ratification thereof.*—A corporation was formed for the purpose of building a railroad, and became indebted to a bank for money borrowed to carry on its work. The corporation was forced to borrow money almost from the day of its organization, and in every instance was compelled to give collateral security; the board of directors had, in many instances, authorized the transfer of collaterals by the president for the purpose of borrowing money; and had even authorized the mortgaging of its lands by its president for that purpose; the books of the corporation were kept open at their principal office, and all transactions were entered upon them; and the directors knew of the large indebtedness of the said corporation to the bank. Without express authority from the directors, or the stockholders, the president, as the active financial agent of the said corporation, transferred to said bank, as collateral security for said indebtedness, a note of subscription to the capital stock of the railroad company, which had been transferred to the said construction company. Subsequent to this transfer, six of the nine directors of said corporation separately signed, but not at a meeting of the directory, a paper ratifying this transfer by the president to the bank of the said note as collateral security. *Held*, that said transfer was ratified by the corporation, and was binding *Ib.* 79.
4. *Ratification by corporation of acts by its promoters.*—A corporation, after its organization, has the power to accept and ratify the agreements and covenants of its promoters, made to effect or carry out the purposes of its organization, and, when accepted and ratified, such agreements and covenants are mutually binding. *Davis v. Montgomery P. & C. Co.*, 127.
5. *Infants; ratification after attaining majority.*—A contract by an infant, being merely voidable and not void by reason of the infancy, is subject to ratification after attaining majority, and any declarations or acts by the infant, after arriving at full

RATIFICATION—*Continued.*

age, that clearly recognize the existence of the contract as a binding obligation, will constitute a ratification, although at the time of the declaration made or the act done the infant did not know that he or she had a right to avoid the contract. *Amer. Mortg. Co. v. Wright*, 658.

6. *Execution of mortgage by infant; ratification by payment of interest notes.*—Where a mortgage is executed by an infant as security for money loaned, the payment, after arriving at full age, of the interest notes as they mature, is a ratification of the voidable contract, which thereafter becomes a binding obligation. *Ib.* 658.

RECEIVER.

1. *Appointment of a receiver upon a bill filed to dissolve a corporation.*—When a bill filed by stockholders to dissolve a corporation, as provided by statute (Code, § 1683), contains averments which show a necessity for the appointment of a receiver for the corporation pending the proceeding for dissolution, a chancery court may appoint such receiver, *Florence Gas, Elec. Light & Power Co. v. Hanby*, 15.
2. *Powers of receiver appointed pending proceedings for the dissolution of a corporation.*—When a bill which seeks the dissolution of a corporation contains averments showing special grounds for the appointment of a receiver pending such proceedings, the receiver to be appointed by the court is authorized, not only to execute and perform the existing contracts of the corporation, but also to enter into and carry out new contracts in behalf of the company. *Ib.* 15.
3. *Appointment of a receiver; can not be questioned in collateral proceedings.*—(On a bill filed by the receiver of a corporation, who was acting under an appointment made after the dissolution of the company (Code, §§ 1683-86), the validity of his former appointment as receiver pending the dissolution proceedings, can not be assailed; said attack being made in a collateral proceeding. *Ib.* 15.
4. *Power of receiver of dissolved corporation to carry out existing contract.*—While a receiver, appointed under section 1686 of the Code has no authority, as a general rule, to carry out and perform existing contracts of the dissolved corporation, and can only be empowered to perform such conditions as are prescribed by said section, he may, nevertheless, complete the execution of an existing contract, when such execution is necessary to the discharge of the duties and powers expressly imposed and conferred by such statute. *Ib.* 15.
5. *Specific performance of a contract; when not enforceable.*—When, on a bill filed by the receiver of a dissolved corporation, seeking the specific performance of a contract made between such corporation and another company, it is shown that in the contract the corporation, of which the complainant is the receiver, agreed to construct an electric light plant for the defendant corporation, and to pay off debts due from the defendant corporation, some of which were secured by a mortgage, and that the defendant agreed to issue first mortgage bonds to the construction company, to secure the debt arising from the performance of the work stipulated, with leave to take the bonds in absolute payment after a certain time, a specific performance of such a contract can not be decreed, when the bill contains no averment that the debts due from the defendant to third parties, which were agreed to be paid by the construction company, had been paid, nor an averment of an offer, or even a readiness or willingness to pay such debts; the failure of the

RECEIVER—*Continued.*

construction company to perform its part of the contract by paying the debts, making a specific performance of the contract by the defendant, by the delivery of first mortgage bonds, impossible. *Ib.* 15.

6. *Jurisdiction of court of equity notwithstanding property in the hands of a receiver.*—In a bill filed to enjoin a railroad corporation owning a majority of the stock in another railroad corporation from voting its stock in the management of the affairs of the latter company, and in the election of its officers, the jurisdiction of the court is not ousted, and the right to grant the relief prayed for is not effected, by the fact that the road whose stock is controlled by the other corporation is in the hands of a receiver, appointed by other courts. *George v. Central R. R. & Banking Co.*, 607.

REDEMPTION.

1. *Taxes; redemption by delinquent payer from purchaser at tax sale.*—Where lands sold for unpaid taxes are redeemed from the purchaser by the delinquent tax payer, they again become subject to the lien for taxes which were delinquent prior to said sale, although as to the purchaser, such sale conferred upon him a clear legal title in fee simple. *Winter v. City Council of Montgomery*, 649.
2. *Sale of property for taxes; when purchase made in interest of delinquent owner.*—After the rendition of a decree ordering the lands of W. to be sold for the payment of city taxes delinquent prior to 1884, the lands were sold for taxes for the year 1884, accruing subsequently to the taxes embraced in the decree, and bought by T. T. having made default as to the State and county taxes while apparent owner, the lands were again sold, and purchased by the State, and afterwards sold to F. as the grantee of T. W., after redeeming from T., who had purchased as her agent, also redeemed from the heirs of F. *Held*, that the purchase of F. was for the benefit of W., the original owner, and that his title, being built on the defaults of the original owner and her agent, could not free the lands from the lien of the decree ordering the sale of the lands for delinquent city taxes, which accrued prior to 1884. *Ib.* 649.
3. *Bill to enforce statutory redemption; tender must be averred.*—A bill filed to enforce a statutory right of redemption is without equity, unless it avers a tender as required by statute to the purchaser or his vendee; and when such tender was not practicable before bill filed, the bill, after alleging a sufficient excuse for such failure, must also aver a present tender by payment into court, accompanied by delivery of the money to the register. *Beatty v. Brown*, 695.
4. *Bill to redeem; multifariousness*—A bill filed to redeem lands covered by several mortgages to the same defendant, and to have cancelled a deed executed by the sheriff under an execution sale, the judgment debt being paid, and to have cancelled a deed from the mortgagee defendant to his sister, which was made without consideration, is not multifarious, since the court having jurisdiction for one purpose will, upon proper proof, settle all questions necessary to the granting of the relief prayed. *Lyon v. Dees*, 700.
5. *Same; mortgagee chargeable with proceeds from the sale of land.*—On a bill filed for redemption from various mortgages given to secure the same debt and for an accounting, the mortgagee is properly chargeable with the price of a part of the land sold under one of the mortgages, though a defective deed was made to the purchaser, and the latter had not paid the amount bid at the

REDEMPTION—*Continued.*

sale, when it appears that the conveyance was intended to operate as a deed, and the sale has been ratified by the mortgagor who is the complainant. *Ib.* 700.

RELEASE AND DISCHARGE.

1. *Landlord's acceptance of rent not a release for conversion of wood by tenant.*—While the facts that the acceptance by the landlord of rent from his tenant, for a period subsequent to the wrongful severance of trees from the leased premises and the conversion thereof by the tenant, and that the landlord executed a new lease for a subsequent time, may amount to a waiver of the forfeiture of the lease current at the time of the severance, they do not operate as a release of the tenant's liability for the wood wrongfully severed and converted by him. *Brooks v. Rogers*, 111.
2. *Burden of proof as to release of cause of action.*—In an action of trover by the landlord against the tenant for the conversion of wood wrongfully cut from the rented premises, where the tenant claims that the landlord had released the cause of action, the burden of proving such release is upon the tenant. *Ib.* 111.

RENT.

1. *Landlord's lien; can be enforced independently of attachment.*—A lien secured to the landlord of a storehouse, dwelling house, or other building by section 3069 of the Code of 1886, can be enforced independently of the remedy by attachment given in section 3070 of the Code. *Carmen & Begg v. Ala. Nat. Bank*, 189.
2. *Attachment; resort thereto no bar to bill by landlord to enforce his lien.*—The remedy by attachment being cumulative, a resort to that writ for the enforcement of rent already matured, is no bar to a suit in equity by a landlord to enforce his lien against the proceeds of sale under attachment, issued at the instance of other creditors of the tenant, for the rent not matured. *Ib.* 189.
3. *Vendor in possession accountable for rents and profits.*—A vendor of land, who has retained title and taken possession, and has bound himself to convey on payment of the purchase money, is accountable to the vendee or his assignee for rents and profits arising from said lands, to the same extent that a mortgagee in possession is accountable to the mortgagor. *Ashurst v. Peck*, 499.

REPEAL.

1. *Repeal of general corporation laws; effect as to corporations formed thereunder.*—The repeal of a general corporation law can not be construed, in the absence of express provisions, as intended to repeal the charters of corporations formed under such law previous to its repeal, when the manifest purpose of the repealing act is to substitute a new law, extending the provisions of the old, supplying omissions, and perfecting its details, without changing its general policy, or interfering with corporations formed under it. *Bibb v. Hall*, 79.
2. *When statute repealed by later statute.*—When a statute to provide for and regulate contests of elections expressed the intention and attempt to repeal, by numbers, every section of the Code providing for and regulating contests of elections, and is not a re-enactment of the sections attempted to be repealed, but is the enactment of a new statute, with substantially different provisions, the said sections of the Code are repealed and destroyed by the later statute. *Turnipsced v. Jones*, 593.

REPEAL—Continued.

3. *Effect of repealing statute upon pending contest.*—The repeal of a statute upon the very day judgment is rendered in a proceeding commenced under its provisions puts an end to such suit. *Ib* 593.
4. *Same.*—Where, on the very day a judgment is rendered in a contest of election proceedings, instituted under the several sections of the Code providing therefor, the Governor approved an act to provide for and regulate contests of elections, which repealed the sections of the Code under which the contest was instituted, the case falls within the influence of the later statute, and the repeal of the statutory provisions under which the proceedings were commenced puts an end to the contest. *Ib* 593.

REPLEVY BOND.

1. *Replevy bond; statutory requirements.*—A replevy bond given by the defendants in a detinue suit, which contains no condition or obligation to pay costs or damages, does not conform to the requirements of the statute, and is not a statutory bond; but is binding as a common law obligation. *Heard v. Hicks*, 102.
2. *Attorney's fees are not recoverable in a suit on a replevy bond.*—In an action on a replevy bond, given by defendants in detinue, which contains no stipulation for the payment of damages, attorney's fees are not recoverable; sureties are bound only to the extent expressed in their obligation or imposed by law. *Ib* 102.
3. *Action on replevy bond; tender by defendant of assessed value of property.*—When pending an action of detinue, and after the execution by the defendants therein of a replevy bond, a part of the property was destroyed by fire, a tender by the defendants, within 30 days after the rendition of the judgment, of the value of the property so destroyed, as assessed in the detinue suit, meets the obligation of the bond as to the property so destroyed; and it is the duty of the plaintiff to accept the tender. *Ib* 102.
4. *Same; plaintiff entitled to compensation for damage to property injured; evidence of damage admissible.*—When, after the execution of a replevy bond by the defendants in an action of detinue, and pending the suit, a portion of the property replevied is damaged, but not wholly destroyed, by fire, the plaintiff is entitled to compensation for the injury to the property, and evidence tending to show the amount of damage is competent and relevant. *Ib* 102.
5. *Same; waiver of claim for damages by plaintiff a question for the jury.*—In an action on a replevy bond, when there is testimony tending to show that after the alleged tender of the property replevied by the defendants, the plaintiff exercised control over the property tendered, it is a question for the jury, whether or not he refused such property, and shall be held to have waived his claim for damages to it while in defendant's possession. *Ib* 102.
6. *Same; plaintiff estopped.*—In an action on a replevy bond, if it is shown that the plaintiff, with knowledge thereof, received property in lieu of that for which he sued in the detinue suit, and for which defendants gave the replevy bond, and, after being informed of the substitution, retained the substituted property, exercising acts of ownership over it, he is estopped from claiming a forfeiture of the bond for the non-delivery of the property originally sued for. *Ib* 102.

RIGHT OF WAY.

See EASEMENTS.

SALES.

1. *Sale of property; evidence of acts of ownership.*—In an action to recover the price of property alleged to have been sold to the defendant, evidence of any acts of ownership or control over the said property by the plaintiffs, subsequent to the sale counted upon, is admissible as tending to disprove the alleged sale. *Tenn River Transp. Co. v. Kavanaugh Bros.* 1.
2. *Sale of lands for distribution; burden of proof.*—Land can not be sold for distribution except upon satisfactory proof that it can not be partitioned without the sale; and the burden rests upon the petitioner to make this proof. *Mitchell v. Mitchell*, 183.
3. *Conveyance of stock of goods, absolute in form, but intended as a mortgage.*—A conveyance of his entire stock of goods by a debtor to one of his creditors, in form an absolute sale, but intended only as a mortgage or as a security for an indebtedness, the debtor being permitted to remain in possession, to carry on the business, and to sell the property in regular course of trade for his own benefit, is made in trust for his own use, and is, therefore, under the provision of the statute (Code, § 1730), fraudulent and void, as against subsequent, as well as existing creditors. *O'Neil et al. v. Birmingham Brewing Co.*, 383.
4. *Bill to set aside fraudulent conveyance; joinder of existing and subsequent creditors.*—Where a transfer by a debtor to one of his creditors, in form an absolute sale, but intended as a security for an indebtedness, is void under section 1730 of the Code, as being made for the use of the debtor executing the conveyance, existing and subsequent creditors may join in a bill seeking to set aside such conveyance as fraudulent and void. *Ib.* 383.
5. *Title acquired by purchaser at execution sale.*—F., after the execution of a mortgage to M., which was still unsatisfied, sold the land conveyed therein to W. After the agreement of sale, but before the conveyance by deed, judgment was recovered in the United States Circuit Court against F. After F. had conveyed the lands to W. by deed, the United States marshal sold the same land under an execution issued upon the judgment recovered against F., and at this sale T. became the purchaser. *Held*, that W. and T. are both equitable claimants, and that the equity of W., being the older, is superior to that of T., conveyed by the marshal's deed. *Troy v. May*, 401.
6. *Right of purchaser at an execution sale.*—When, before the mortgage debt is paid, the mortgagor agrees to sell to a third person the lands conveyed in said mortgage, and after this agreement a judgment is recovered against the said mortgagor, and execution thereunder is levied upon the same lands, and the said lands are sold under this execution, after the execution of the deed in compliance with the agreement of sale, the purchaser at said execution sale acquires the equity of redemption, and as the holder of such equity, is entitled to the excess of the balance due the mortgagor paid by the one who purchases at a subsequent sale under the mortgage. *Ib.* 401.
7. *Statute of frauds; promise to answer for debt, default or miscarriage of another.*—When at the instance of one person, goods are sold to another for his sole use and benefit, and any credit whatever is extended to the party to whom the consideration moves, the debt is that of the latter, and the other party's obligation is that of guarantor, which, under the statute (Code, § 1732), to be binding must be in writing. *Webb v. Hawkins Lumber Co.*, 630.
8. *Same.*—When in an action to recover for goods sold, it is shown that the defendant applied to the plaintiff to fill an order for another person, and said that he, the defendant, "would guarantee the bill and pay for it," and that thereupon the goods were shipped and the account was charged on the books of the

SALES—Continued.

- plaintiff to the person for whom the goods were bought, and that the plaintiff looked for payment to both the defendant and the person for whom the goods were bought, the promise of the defendant was to answer for the debt, default or miscarriage of another (Code, § 1732), and to be binding should have been in writing, expressing a consideration signed by him. *Ib.* 630.
9. *Taxes; redemption by delinquent payer from purchaser at tax sale.*—Where lands sold for unpaid taxes are redeemed from the purchaser by the delinquent tax payer, they again become subject to the lien for taxes which were delinquent prior to said sale, although as to the purchaser, such sale conferred upon him a clear legal title in fee simple. *Winter v. City Council of Montgomery*, 649.
 10. *Sale of property for taxes; when purchase made in interest of delinquent owner.*—After the rendition of a decree ordering the lands of W. to be sold for the payment of city taxes delinquent prior to 1884, the lands were sold for taxes for the year 1884, accruing subsequently to the taxes embraced in the decree, and bought by T. T. having made default as to the State and county taxes while apparent owner, the lands were again sold, and purchased by the State, and afterwards sold to F. as the grantee of T. W., after redeeming from T., who had purchased as her agent, also redeemed from the heirs of F. *Held*, that the purchase of F. was for the benefit of W., the original owner, and that his title, being built on the defaults of the original owner and her agent, could not free the lands from the lien of the decree ordering the sale of the lands for delinquent city taxes, which accrued prior to 1884. *Ib.* 649.

SERVICE OF PROCESS.

1. *Probate of a will; service of notice on infants.*—In a proceeding for the probate of a will, service of notice upon infants next of kin by handing them a copy is insufficient to bring them into court; the copy should have been left with the father, mother, guardian, or other person having the custody of the minors. *Herring v. Ricketts*, 340.
2. *Appointment of a guardian ad litem for infants.*—Until infants are brought into court by a service of process, according to the rules of practice, the appointment of a guardian ad litem for them is unauthorized, irregular, and not sufficient to support a decree against them. *Ib.* 340.
3. *Probate of a will; notice thereof.*—If a will is admitted to probate without legal service of notice upon the persons who are by law entitled thereto, the probate will be vacated and revoked on their application. *Ib.* 340.

SOLICITORS.

1. *Act to pay solicitors' salaries; counties' right to surplus in the state treasury.*—Under the provisions of the "act to pay solicitors' salaries," approved February 28, 1887, (Acts 1886-87, p. 161), there must be annual adjustments and ascertainment of the surpluses of solicitors' fees paid into the state treasury over and above the salaries of solicitors, by deducting the aggregate of the salaries of solicitors from the aggregate of all solicitors' fees paid into the state treasury during the preceding year, from whatever source derived; and each county is then entitled to receive its proportionate share in the remainder. *Purifoy v. Andrews*, 643.
2. *Same; computation without regard to judicial circuits or act of February 25, 1889.*—Such annual adjustments and ascertainment

SOLICITORS—*Continued.*

must be made without regard to the judicial circuits, and are unaffected by the act approved February 25, 1889, (Acts 1888-89, p. 55), providing for payments out of the state treasury of the costs in cases where the defendants are sentenced to imprisonment in the penitentiary. *Ib.* 643.

3. *Mandamus to compel auditor to draw warrant for counties' shares of surpluses in state treasury from solicitors' fees.*—After adjustment and ascertainment of the surplus of solicitors' fees in the state treasury, over and above the salaries paid solicitors, as provided by act of February 28, 1887, (Acts 1886-87, p. 161), the auditor must draw his warrants on the treasurer in favor of the counties, respectively, for the several sums ascertained to be due them; and upon his refusal to do so, he may be compelled thereby by *mandamus*. *Florence Gas, El. Light & Power Co. v. Hanby*, 643.

SPECIFIC PERFORMANCE.

2. *Specific performance; what necessary to justify decree.*—To justify a decree for the specific performance of a contract of sale or conveyance of land, the terms of the contract must be definitely alleged, and the evidence to establish it must be such as to produce a clear conviction of the existence and terms of the contract as alleged. *Whisenant v. Gordon*, 250.
3. *Statute of frauds; waiver as a defense to a bill for specific performance.*—The statute of frauds, as a defense to a bill for the specific performance of a contract, is waived unless specially pleaded; and the contract being admitted or satisfactorily proved, it will be enforced although it may be obnoxious to the statute. *Ib.* 250.
4. *Parol agreement for conveyance of land; when specifically enforced.*—A parol agreement for the re-conveyance of land will be specifically enforced, at the suit of the vendee of the original vendor, when the circumstances surrounding the transaction, the conduct of the parties, and the declarations of the grantee in the original conveyance show that it was the intention of the parties to rescind the former sale and revest the title in the grantor. *Ib.* 250.
5. *If a contract can not be performed, damages should be awarded in the alternative.*—When a bill in equity is filed for the purpose of enforcing the specific performance of a contract, the assessment of damages against the defendant can not properly be made until it is shown he was, or might be unable to perform his contract, and then, not without giving him an opportunity to do so; the damages in such cases being awarded in the alternative. *Eastman et al. v. Reid et al.*, 320.
6. *Complainant's knowledge of defendant's inability to perform a contract defeats a bill filed for that purpose.*—If, at the time of filing a bill to enforce the specific performance of a contract, the complainant knows that the contract can not be specifically performed, his bill will not be entertained for the purpose of granting him compensation by the award of damages. *Ib.* 320.
7. *When separate decree in favor of several complainants erroneous.*—When one of two complainants in a bill seeking the specific performance of a contract derives his interest in the contract from the indorsement thereon by his co-complainant, it is error to render two separate decrees against the defendants, one in favor of each complainant; there should be but one joint decree in favor of complainants. *Ib.* 320.
8. *Alleged fraudulent transfer of stock; when moneyed decree against transferee erroneous.*—In a bill seeking the specific performance of a contract for the transfer of stock in a corporation to com-

SPECIFIC PERFORMANCE—*Continued.*

plainants, where it is alleged that the contractor had transferred all of his stock in said corporation to his wife without consideration, and to defraud complainants, but there is no averment showing that the wife had any knowledge of, or connection with the alleged fraudulent design, it is error to render a moneyed decree against the wife, although she was a party defendant to the said bill. *Ib.* 320.

9. *Bill to enforce specific performance; failure to aver when purchase money payable.*—When a contract of purchase stipulates that the vendor will convey the lands when the "vendee pays or causes to be paid" the purchase money, and that the contract was based on a note then executed by the vendee and another note he would thereafter execute for the purchase money, a bill filed by one claiming under the vendee against the administratrix of the vendor to enforce the specific performance of said contract, which avers that complainant does not know whether the notes were ever executed, and makes no other averment as to when the contract was to be performed by the vendee paying the purchase money, is not open to demurrer on the ground, that it fails to show when the purchase money was payable, since the complainant could assume that the contract was to be performed by the vendee within a reasonable time. *Ashurst v. Peck*, 499.
10. *Same; insufficient demurrer.*—Although in such a bill, an averment that the "complainant does not know whether the notes were ever executed or not" is insufficient to excuse a more specific averment of the terms of a contract, in that it does not show that complainant had done what he ought to have done to inform himself in the premises, a demurrer on the ground that "the bill fails to describe the notes alleged to have been executed for the purchase money, or to show when same was due," is not sufficient to raise this objection. *Ib.* 499.
11. *Bill in equity to specifically enforce a contract; stale demand.*—A demurrer to a bill, filed by one claiming under the vendee in a contract of purchase to enforce the specific performance of said contract, on the ground that the "alleged right of complainant is stale," is based on the ground that a demand or claim by the complainant has not been asserted for so long a time that the court is without equity to enforce it; and does not raise, as "an objection to the maintenance of the bill, that the complainant has so acquiesced in the assertion by the vendor and his personal representative of possession of the land, and a retention by them of the rents and profits, that a court of equity, in the discretionary exercise of its jurisdiction to enforce an executory contract, will not lend its aid to the enforcement of the contract involved in such suit. *Ib.* 499.
12. *Bill to enforce the specific performance of a contract of sale; tender of deed before filing bill not necessary.*—It is not essential to the maintenance of a bill for the specific performance of a contract of sale, that the complainant, who is the vendee, should offer to perform or tender a deed before filing the bill; a failure to do so affects only the question of costs. *Ib.* 499.
13. *Vendor in possession accountable for rents and profits.*—A vendor of land, who has retained title and taken possession, and has bound himself to convey on payment of the purchase money is accountable to the vendee or his assignee for rents and profits arising from said lands, to the same extent that a mortgagee in possession is accountable to the mortgagor. *Ib.* 499.

STALE DEMAND.

1. *Bill in equity to specifically enforce a contract; stale demand.*—A demurrer to a bill, filed by one claiming under the vendee in a contract of purchase to enforce the specific performance of said contract, on the ground that the "alleged right of complainant is stale," is based on the ground that a demand or claim by the complainant has not been asserted for so long a time that the court is without equity to enforce it; and does not raise, as an objection to the maintenance of the bill, that the complainant has so acquiesced in the assertion by the vendor and his personal representative of possession of the land, and a retention by them of the rents and profits, that a court of equity, in the discretionary exercise of its jurisdiction to enforce an executory contract, will not lend its aid to the enforcement of the contract involved in such suit. *Ashurst v. Peck*, 499.

STATUTES.

1. *When right to a mechanic's and a material-man's lien not affected by act of February 12, 1891.*—When a contract is entered into, and the work and materials for which a lien is sought to be enforced were done and supplied, and a bill to enforce such lien is filed, prior to the passage of the act of February 12, 1891, (Acts 1890-91, p. 578), providing for mechanic's and material-man's lien, the right to the enforcement of such lien is not affected by said act. *Florence Gas, El. Light & Power Co. v. Hanby*, 15.
2. *Constitutionality of the act to establish a board of police commissioners for the city of Birmingham.*—The act approved December 12, 1892, "To establish a board of commissioners of police for the city of Birmingham, Alabama," which confers upon the probate judge of Jefferson county, the county in which the city of Birmingham is situated, the power to appoint the commissioners, is not unconstitutional and void by reason of conferring upon a member of the judicial department the power of appointment. *For v. McDonald*, 51.
3. *Legislative enactments presumed to be constitutional.*—Legislative enactments are always presumed to be in accord with the constitution, and will not be declared unconstitutional and void, unless it clearly appears that they offend some provision of the constitution. *Ib.* 51.
4. *The act to establish a board of police commissioners of the city of Birmingham not unconstitutional, as denying to the city the right of local self-government.*—The act "To establish a board of commissioners of police for the city of Birmingham," which confers on the probate judge of Jefferson county the power to appoint the commissioners, but does not in express terms provide that the commissioners so appointed shall be residents of the city of Birmingham, is not unconstitutional because of such omission; the controlling purpose of the act being to provide an efficient enforcement of the police powers of Birmingham, and the intention that the commissioners to be appointed shall be residents of the said city being manifest on the face of the statute itself. (COLEMAN, J. concurring in the conclusion, but not in the reason therefor.) *Ib.* 51.
5. *Legislative enactments; when they go into operation.*—Legislative enactments and their provisions go into immediate operation, unless by force of some general law, or some provision contained in the act itself, the operation is postponed, and the special provision fixing such postponement must be in terms so clear and certain as to admit of no other rational interpretation. *Ib.* 51.
6. *Termination of the tenure of former officers upon appointment under a new statute.*—Under the act establishing the board of police commissioners for the city of Birmingham, which provided for

STATUTES—Continued.

the appointment of commissioners by the probate judge of Jefferson county on a certain day, the tenure of the several police officers serving at the time of the passage of said act terminated so soon as the police commissioners were appointed by the probate judge; their appointment necessarily annulling the power under which the former police officers held. *Ib.* 51.

7. *Act not unconstitutional because the title fails to express the object to determine the terms of the police officers.*—The title of a legislative enactment as "An act to establish a board of commissioners of police for the city of Birmingham, Alabama," implies the insertion in the act of all powers reasonably necessary to the efficient administration of the police department of the city by the police to be appointed, which includes the power to appoint police officers; and the fact that this power to appoint is effected by cutting off the terms of the incumbents does not render the act unconstitutional, because that object is not expressed in the title; the title of the act being sufficiently comprehensive to include this result. *Ib.* 51.
8. *Repeal of general corporation laws; effect as to corporations formed thereunder.*—The repeal of a general corporation law can not be construed, in the absence of express provisions, as intended to repeal the charters of corporations formed under such law previous to its repeal, when the manifest purpose of the repealing act is to substitute a new law, extending the provisions of the old, supplying omissions, and perfecting its details, without changing its general policy, or interfering with corporations formed under it. *Bibb v. Hall & Farley*, 81.
9. *Testimony as to statement made by decedent; competency of witnesses interested in the suit.*—The exception as to competency of witnesses, provided by statute (Acts 1890-91, p. 557), being for the protection of the estate of the deceased and those claiming under him, when the estate of the deceased person is interested in the result of a proceeding, the adversary of said estate can not object to the competency of witnesses called by the representatives of the deceased in such proceedings, to prove transactions with or statements by the deceased, on the ground that the witnesses are heirs of the deceased and directly interested in the result of the suit. *Austin v. Bran*, 133.
10. *Creation of new county; transfer of administration from probate court of old to new county.*—The legislature, in the passage of the act approved December 7, 1866 (Acts 1866-7, p. 92), creating the county of Clay out of portions of Talladega and Randolph, made no provision concerning the administration of estates pending in the probate courts of the old counties; and in the absence of any such provision such administrations continued in the probate courts of the parent counties, unaffected by the formation of the new county, although the property of the estate is situated, and the administrator resides, in the new county. *Page v. Bartlett*, 193.
11. *Same.*—In an act forming a new county out of portions of old counties, a provision for the transfer of suits pending against defendants from the courts of the old counties into those of the new, without referring to administrations pending in the former, is to be construed as an expression of legislative intent that such administrations should not be removed into the probate court of the new county. *Ib.* 193.
12. *Same; transfer of administration from probate to chancery court.*—Where an act forming a new county out of portions of two old counties makes no provision concerning the administration of estates pending in probate courts of the older counties, if it becomes necessary or proper to transfer into a court of equity the

STATUTES—Continued.

- settlement of the administration of an estate situated in the new county, but which was pending in the probate court of one of the older counties, such settlement must be removed into the chancery court of the old county in whose probate court such administration was pending; the chancery court of the new county having no jurisdiction thereof. *Ib.* 193.
13. *Earnings of wife; separate estate therein.*—Prior to the act approved February 28, 1887, by which the earnings of the wife were made her separate estate, the husband could, by contract, gift or renunciation of all right to them, invest the wife with a separate estate therein; and while such voluntary gift or renunciation is not valid as against the husband's existing creditors, it is valid as to subsequent creditors, unless shown to have been infected with actual fraud. *Bates v. Morris*, 282.
 14. *Construction of a statute incorporating a town.*—An act of the general assembly incorporating a town, which declares that the corporate limits shall be "one mile each way, north, south, east and west, from the courthouse square," as laid out by a land company, will be construed to fix the boundary lines of the corporate limits of said town to be almost a circle, with a radius of one mile, with its center at the courthouse square; and a place of business two hundred yards southwest from the courthouse square is within the corporate limits. *Town of Luverne v. Shows*, 359.
 15. *Penal statutes; act regulating the doing of business by foreign corporations in this State.*—The act approved February 28, 1887, "to give force and effect to section 4, Article XIV of the constitution," which regulates the manner of conducting business in this State by foreign corporations, which prescribes the penalties for the violation of the fundamental law in reference thereto, and which provides means for the enforcing and collecting such penalties, is a penal statute under the law (Code, § 3705), and did not go into effect until thirty days after the adjournment of the General Assembly at which it was passed; the act itself not specifically providing for an earlier date for it to take effect. *Ross v. N. E. Mort. Sec. Co.*, 362.
 16. *Mortgage to foreign corporations; when not controlled by act approved February 28, 1887.*—The act approved February 28, 1887, "to give force and effect to section 4, Article XIV of the constitution," is a penal law, and a mortgage executed by a resident of this State to a foreign corporation on March 1, 1887, being executed within thirty days after the adjournment of the General Assembly, at which said act was passed, is not governed by its provisions, and not being violative of any other statute, is a valid and binding contract between the parties. *Ib.* 362.
 17. *Homestead set apart to the widow; her estate therein.*—When a homestead, which does not exceed 160 acres and two thousand dollars in value, has been set apart to the widow as exempt under the act approved February 12, 1885, (Sess. Acts 1884-85, p. 114), she takes an absolute inheritable estate in such homestead. *Smith v. Bontrell*, 373.
 18. *Constitutionality of statute regulating descents and succession to property.*—The act approved February 12, 1885, (Sess. Acts 1884-85, p. 114), which provides for the setting apart of the homestead exemption to the widow, and defines her estate therein, is constitutional, since "each State has the right to enact laws for the regulation of descents and succession to property within its limits." *Ib.* 373.
 19. *Unconstitutionality of act extending operation of former act.*—The act approved February 9, 1893, entitled "An act to declare inoperative an act entitled 'An act to change the boundary line

STATUTES—*Continued.*

- between the counties of Talladega and Clay in this State,' approved January 10, 1877, and to provide for the location of the line between said counties," is violative of so much of section 3, Article IV of the Constitution as provides that no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only. *Miller, Judge, v. Berry, 531.*
20. *Title and subject matter of statutes under constitutional provisions.*—The act approved February 21, 1893, entitled "An act to provide for and regulate the pay of State witnesses in Tuscaloosa county," (Acts 1892-93, pp. 934-936), is violative of the constitutional provision that "each law shall contain but one subject which shall be clearly expressed in its title," (Const. Art. IV, § 2), because the said act not only undertakes to provide for and regulate the payment of State witnesses, but also the payment of officers' costs accruing in behalf of the State, which latter provision was to a subject matter not expressed in the caption of the act. *Yerby v. Cochrane, 541.*
 21. *Same; when whole act declared void.*—Since the provisions of said act in relation to the payment of officers' costs (the subject not expressed in the title) can not separated from the provisions in reference to the payment of State witnesses, so that the former may be stricken from the act and leave the statute complete within itself, capable of being executed, and wholly independent of those provisions which are rejected, the whole act is void. *Ib. 541.*
 22. *Same.*—When a statute contains two subject matters, only one which is clearly expressed in the title, and the provisions in reference to these separate subjects are not separable, so that the provisions in reference to the subject which is not expressed in the title can not be stricken out and leave the act to operate according to its terms and the clear intent of the legislature, the whole of the act is unconstitutional and void. *Ib. 541.*
 23. *Action of detainee; want of consideration for the mortgage as a defense.*—Where the plaintiff's title in a detainee suit depends upon a mortgage, the defendant mortgagor may, under the provisions of section 2720 of the Code, as amended by act approved February 21, 1893, (Acts 1892-93, p. 127), defend on the ground of the want of failure of consideration for the mortgage. *Lewis v. Simon & Co., 546.*
 24. *When remedial statute goes into operation.*—A statute to provide for and regulate contests of elections, being remedial in its character, and not prescribing punishments or penalties, becomes operative and is of force during the entire day on which it was approved; the law in reference thereto not regarding a fraction of a day. *Turnipsseed v. Jones, 593.*
 25. *When statute repealed by later statute.*—When a statute to provide for and regulate contests of elections expressed the intention and attempt to repeal, by numbers, every section of the Code providing for and regulating contests of elections, and is not a re-enactment of the sections attempted to be repealed, but is the enactment of a new statute, with substantially different provisions, the said sections of the Code are repealed and destroyed by the later statute. *Ib. 593.*
 26. *Effect of repealing statute upon pending contest.*—The repeal of a statute upon the very day judgment is rendered in a proceeding commenced under its provisions puts an end to such suit. *Ib. 593.*
 27. *Same.*—Where, on the very day a judgment is rendered in a contest of election proceedings, instituted under the several sections of the Code providing therefor, the Governor approved an

STATUTES—Continued.

- act to provide for and regulate contests of elections, which repealed the sections of the Code under which the contest was instituted, the case falls within the influence of the later statute, and the repeal of the statutory provisions under which the proceedings were commenced puts an end to the contest. *Ib.* 593.
28. *Act to pay solicitors' salaries; counties' right to surplus in the state treasury*—Under the provisions of the "act to pay solicitors' salaries," approved February 28, 1887. (Acts 1886-87, p. 161), there must be annual adjustments and ascertainment of the surpluses of solicitors' fees paid into the state treasury over and above the salaries of solicitors, by deducting the aggregate of the salaries of solicitors from the aggregate of all solicitors' fees paid into the state treasury during the preceding year, from whatever source derived; and each county is then entitled to receive its proportionate share in the remainder. *Purifoy v. Andrews*, 643.
29. *Same; computation without regard to judicial circuits or act of February 25, 1889*.—Such annual adjustments and ascertainments must be made without regard to the judicial circuits, and are unaffected by the act approved February 25, 1889, (Acts 1888-89, p. 55), providing for payments out of the state treasury of the costs in cases where the defendants are sentenced to imprisonment in the penitentiary. *Ib.* 643.
30. *Mandamus, to compel auditor to draw warrant for counties' share of surpluses in state treasury from solicitors' fees*—After adjustment and ascertainment of the surplus of solicitors' fees in the state treasury, over and above the salaries paid solicitors, as provided by act of February 28, 1887, (Acts 1886-87, p. 161), the auditor must draw his warrants on the treasurer in favor of the counties, respectively, for the several sums ascertained to be due them; and upon his refusal to do so he may be compelled thereto by *mandamus*. *Ib.* 643.

STATUTES OF UNITED STATES.

31. *Purchasers of public land under act of June 15, 1880*.—Under the provisions of the act of Congress of June 15, 1880 (1 Sup. Rev. Stat., p. 558), only the person who has made entry of homestead and failed to perfect the same, or the transferee of such entryman by writing, executed in good faith, can purchase the land attempted to be entered. *Mulloy v. Cook*, 178.
32. *Contract violative of the public policy of the United States*.—A verbal contract by one who makes a homestead entry of Government land and fails to perfect the same, to purchase such lands under the act of Congress of June 15, 1880, (1 Sup. Rev. Stat., p. 558), and upon receipt of patent convey the lands to the one who furnishes the money with which to make the purchase, is violative of the policy of the General Government, and can not be made the basis of equitable relief to enforce a trust in such lands in favor of the one whose money was used in paying therefor. *Ib.* 178.

STATUTORY CLAIM SUIT.

SEE TRIAL OF RIGHT OF PROPERTY.

STOCKS AND STOCKHOLDERS.

1. *Stockholders of a corporation; fraud as a defense to action on note for subscription*.—Where one has been induced by fraud to become a stockholder in a corporation, he may set up this fraud as a defense to an action on his note, given for the payment of the amount of his subscription. *Bibb v. Hall*, 79.

STOCKS AND STOCKHOLDERS—*Continued.*

2. *Subscription to stock; fraud therein; evidence.*—Where, in an action by the transferees of a note, given by a subscriber to the capital stock of a railroad corporation, for the amount of his subscription, the maker of the note, by special plea interposes a defense of fraud in procuring his subscription, and the failure and want of consideration for the note, it is shown by the evidence that the only condition attached to the subscription was that the railroad was to be finished between certain terminal points within a certain time, and that it was to issue to each subscriber two-thirds of the amount subscribed for of its own capital stock, and one-third of the amount in the capital stock of a corporation formed to build said railroad; that the note subsequently executed for the amount of the subscription contained conditions relating only to the time and manner of the completion of the road, and made no reference to stock in the company formed to build said railroad; that on the day of the execution of the note the maker accepted from the said construction company its obligation to exchange one-third of its stock for a like proportion of the amount of his subscription in the railroad company, when the note sued on was paid; that at the time of the execution of the note, and the last mentioned agreement, both corporations had received their certificate of incorporation, and had performed all preliminary acts entitling them to such certificate, except the payment of 20 per cent. of the capital stock; and that the maker of the note himself testified that no representations were made to him that such 20 per cent. had been paid, and he did not inquire or investigate the matter, the fraud attempted to be set up as a defense is not sustained, and there is shown no failure or want of consideration for the note sued on. *Ib.* 79.
3. *Issue of stock by corporation; when presumed to be legal.*—When it is shown that all the capital stock of a corporation has been subscribed and paid for in full, and there is no evidence as to the value of the consideration paid for said stock, it will be presumed that it was adequate, and a court can not declare the issue of such stock fictitious or violative of Article XIV, § 6 of the Constitution, or of section 1862 of the Code of 1886. *Davis v. Montgomery Furnace & Ch. Co.* 127.
4. *Subscribers to corporate bonds; when not liable as stockholders.*—When stock, which has been subscribed, paid for and issued, upon adequate consideration, is by the holders thereof placed in the hands of a trustee to be paid over to subscribers for bonds of the corporation, when their subscriptions to such bonds are paid in full, such stocks, so delivered to the trustee, may be transferred by him to the subscribers for bonds upon payment of their subscriptions, without contravening the Constitution and statutes of the State, (Const. Art. XIV, § 6; Code, § 1862); and the failure to pay their subscriptions for the bonds, does not make such subscribers for said bonds liable upon the stock agreed to be delivered, as upon unpaid subscription for stock. *Ib.* 127.
5. *Subscribers to bonds of a corporation; liable as garnishees.*—Where the contract of subscription to bonds of a corporation provides that upon the payment of the entire amount of the subscription an equal amount of fully paid-up stock of the corporation shall be paid over to the holders of the bonds, and that the subscription is to be paid in monthly instalments of fixed sums, a subscriber to the bonds under such contract, who has paid three instalments, is a debtor to the corporation for the balance due upon his subscription, in such sort as to be subject to process of garnishment by creditors of the corporation, and liable as gar-

STOCKS AND STOCKHOLDERS—*Continued.*

- nishee to the extent of such balance due and unpaid upon his subscription for the bonds. *Ib.* 127.
6. *Lien of corporation on stock.*—Section 1674 of the Code of 1886, which provides that "all private corporations have a lien on the shares of its stockholders, for any debt or liability incurred to it by a stockholder, before notice of the transfer, or of a levy of such shares," confers the lien therein provided to secure debts which had been contracted before its enactment, as well as those contracted afterwards. *Birmingham Trust & Savings Co. v. East Lake Land Co.*, 304.
 7. *Alleged fraudulent transfer of stock; when moneyed decree against transferee erroneous.*—In a bill seeking the specific performance of a contract for the transfer of stock in a corporation to complainants, where it is alleged that the contractor had transferred all of his stock in said corporation to his wife without consideration, and to defraud complainants, but there is no averments showing that the wife had any knowledge of, or connection with the alleged fraudulent design, it is error to render a moneyed decree against the wife, although she was a party defendant to the said bill. *Eastman et al. v. Reid et al.*, 320.
 8. *Bill to enjoin sale of stock; necessary averments.*—In a bill by a stockholder to enjoin the sale by the corporation of his stock, in payment of his debt to said corporation, on the ground that he has a claim against the corporation in excess of his alleged indebtedness, the complaint must aver some fact other than the existence of his demand, which is a proper subject of set-off in order to give his bill equity—such as the insolvency of the corporation, or any other fact respecting his alleged claim, which would justify the interposition of a court of equity. *Ellott v. Sibley, et al.*, 344.
 9. *Bill to enjoin sale of stock; corporation necessary party.*—Where a bill is filed by a stockholder to enjoin the sale by a corporation of his stock to settle an indebtedness due to the corporation, upon the ground that the debt is not due, or has been paid, or that the corporation is indebted to the shareholder in an amount exceeding that claimed to be due the corporation, and which prays for a settlement of account, the corporation itself is an indispensable party. *Ib.* 344.
 10. *Same; complainant must offer to do equity.*—In a bill, filed by a stockholder to enjoin the sale of his stock by a corporation, on the ground that the corporation is indebted to him in an amount exceeding his indebtedness, and which also prays for a settlement of account, the complainant must offer to do equity by averring in his bill a readiness and willingness to pay whatever amount may be ascertained to be due from him to the corporation. *Ib.* 344.
 11. *Enforcement by a corporation of a lien under section 1674; no action by directors necessary.*—In order that a corporation may enforce the lien given it by statute. (Code, § 1674), against a stockholder to collect a past due indebtedness from him, there is, *prima facie*, no action necessary on the part of the directors; and the averment in the bill filed by a stockholder to enjoin the sale of his stock to collect a debt fixed by contract, that the directors of the corporation have taken no action to authorize the threatened sale, can not give the bill equity. *Ib.* 344.
 12. *Injunction against a railroad corporation voting stock in another railroad corporation.*—Where one railroad corporation has purchased a majority of the stock of another railroad corporation, with the intent and purpose of getting the management and control thereof, in order to defeat or lessen competition in the business of the two companies, or to encourage monopoly, and

STOCKS AND STOCKHOLDERS—*Continued.*

the corporation owning the majority of the other's stock violates duties in respect of the property and rights of the other company and its stockholders, committing willful wastes and subjecting said company to a multiplicity of suits, a court of equity will interfere, by an injunction at the suit of a minority of the stockholders, to restrain the said corporation owning the majority of the stock from the use of said stock in the management of the affairs of the other corporation and in the election of its officers. *George v. Cen. R. R. & B. Co.*, 607.

13. *Same; jurisdiction of court of equity notwithstanding property in the hands of a receiver.*—In a bill filed to enjoin a railroad corporation owning a majority of the stock in another railroad corporation from voting its stock in the management of the affairs of the latter company, and in the election of its officers, the jurisdiction of the court is not ousted, and the right to grant the relief prayed for is not effected, by the fact that the road whose stock is controlled by the other corporation is in the hands of a receiver, appointed by other courts. *Ib.* 607.
14. *Same; laches.*—Where a bill is filed by stockholders in a corporation to enjoin another corporation owning a majority of the stock of the former corporation from voting its stock in the control of the affairs and in the election of the officers of said corporation, the fact that the complainant stockholders, after full knowledge of the grounds of complaint alleged in their bill, or full opportunity to acquire such knowledge, acquiesced in the acts complained of for more than six years, does not debar them from having enjoined such use of the stock in the future. *Ib.* 607.
15. *Injunction against a corporation at suit of stockholders; previous request to directors for action.*—A minority of the stockholders of a corporation can not maintain a bill in equity to prevent illegal action on the part of the majority, without a previous request to the proper officers to interfere, and their failure or refusal to do so; but when it is shown that a majority of the stock of said corporation is owned by another corporation, which practically creates and controls the managing and governing bodies of said corporation, the necessity for such a demand upon the governing body is dispensed with, as any such demand would be fruitless. *Ib.* 607.

SUNDAY.

1. *Note executed on Sunday.*—A note executed on Sunday can not be the subject of a recovery. *Hauervas v. Goodloe*, 162.
2. *Action on a note; burden of proving its true date.*—In an action on a note dated on Sunday, the presumption is that the note bears its true date, and the burden is upon the plaintiff to overcome such presumption, by proving that it was executed on a day that was not Sunday. *Ib.* 162.
3. *Evidence; proof of handwriting in a note.*—In an action by a bank on a note dated on Sunday, payable to the bank, testimony that the body of the note sued on was in the handwriting of the bank's cashier, who was not in its employ until after the date of the note, is admissible as tending to prove that the note did not bear its true date. *Ib.* 162.
4. *Same; admissibility of bank book.*—In an action by a bank on a note dated on Sunday, a book of the bank in which the number, name of the maker, date of execution, amount and date of maturity of all notes discounted by the bank are kept, is not admissible in evidence to show that the note sued on was a renewal of another note, which matured on Sunday, and that the

SUNDAY—*Continued.*

renewal note was executed on a day that was not Sunday, but was dated back to the maturity of the old note according to the custom of the bank. *Ib.* 162.

SUPERINTENDENCE.

1. *Action under sub-section 2 of section 2590 of the Code; sufficiency of complaint.*—In an action against a municipal corporation by a laborer employed by it, to recover damages for personal injuries, a count of the complaint which alleges that the defendant, through its agents and employes, intrusted with the superintendence of the work of digging gravel, buried a dynamite cartridge where said gravel was being dug, and that the plaintiff, being employed by defendant, was required to work at the place where the dynamite was buried, without being told that it was there, and that while digging as directed, not knowing the dynamite was buried at such place, struck said cartridge causing it to explode and inflicting upon him serious personal injuries, sets forth a good cause of action under sub-section 2 of section 2590 of the Code, which gives a right of action to an employé "When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence." *City Council of Sheffield v. Harris*, 564.
2. *Municipal corporation bound by acts of its agent or employé; when estopped from denying the legality of his appointment.*—Where one has served a municipal corporation in the capacity of superintendent of certain work carried on by said city, and the municipal authorities have accepted such service and received the benefit of his skill and labor, the municipal corporation can not avoid its responsibility for injuries resulting from his negligence in the doing of work within the scope of the service he was rendering, by denying the legality of his appointment. *Ib.* 564.
3. *Action under sub-section 2 of section 2590 of the Code; erroneous charge to the jury.*—In an action against a municipal corporation by one of its employes, under sub-section 2 of section 2590 of the Code, to recover damages for personal injuries, alleged to have been caused by the negligence of the agent or employé of the defendant intrusted with the superintendence of the work at which the plaintiff was engaged, while in the exercise of such superintendence, in allowing a dynamite cartridge to be left at the place where the plaintiff was required to work, it is error to instruct the jury that, "If the dynamite causing the plaintiff's injury was carelessly and negligently left buried by the defendant, or its servants or agents in the discharge of their duty, before the plaintiff was employed by the defendant, and the plaintiff could not by the use of ordinary care and diligence, or precaution, have discovered the danger, then, I charge you, that the defendant is liable in this action, and your verdict should be for the plaintiff for such amount as you believe from the evidence he was damaged, not exceeding \$8,000"—the amount sued for. *Ib.* 564.

See RAILROADS.

SURETIES.

1. *Attorney's fees are not recoverable in a suit on a replevy bond.*—In an action on a replevy bond, given by defendants in detinue, which contains no stipulation for the payment of damages, attorney's fees are not recoverable; sureties are bound only to the extent

SURETIES—*Continued.*

expressed in their obligation or imposed by law. *Heard v. Hicks*, 102.

TAXATION.

1. *Taxes; redemption by delinquent payer from purchaser at tax sale.*—Where lands sold for unpaid taxes are redeemed from the purchaser by the delinquent tax payer, they again become subject to the lien for taxes which were delinquent prior to said sale, although as to the purchaser, such sale conferred upon him a clear legal title in fee simple. *Winter v. City Council of Montgomery*, 649.
2. *Sale of property for taxes; when purchase made in interest of delinquent owner.*—After the rendition of a decree ordering the lands of W. to be sold for the payment of city taxes delinquent prior to 1884, the lands were sold for taxes for the year 1884, accruing subsequently to the taxes embraced in the decree, and bought by T. T. having made default as to the State and county taxes while apparent owner, the lands were again sold, and purchased by the State, and afterwards sold to F. as the grantee of T. W., after redeeming from T., who had purchased as her agent, also redeemed from the heirs of F. *Held*, that the purchase of F. was for the benefit of W., the original owner, and that his title, being built on the defaults of the original owner and her agent, could not free the lands from the lien of the decree ordering the sale of the lands for delinquent city taxes, which accrued prior to 1884. *Ib.* 649.

TENANTS IN COMMON.

1. *Co-tenant not estopped from asserting equities against existing mortgage.*—When there exists a mortgage on joint property to secure a debt of one of the co-tenants, a partition of the common property by decree of the probate court does not estop the other co-tenants from asserting their equity to have the share allotted to their joint owner sold first to pay such debt, in exoneration of the shares allotted to them. *Austin v. Bean*, 133.
2. *Co-tenant not estopped from asserting equity by exchange of her share by warranty deed.*—The fact that one of the joint owners of common property, immediately after the partition of said lands by decree of the probate court, conveyed the share allotted to her by warranty deed, in exchange for the share of one of her co-tenants, does not estop her from the assertion of her equity to have the share so exchanged sold first, to satisfy a mortgage existing upon the whole property, given to secure a debt of her said co-tenant, the mortgage having been executed prior to the acquisition of title by the co-tenants. *Ib.* 133.
3. *Purchaser from an heir; charged with notice of equity in favor of other heirs.*—The purchaser of land from one who derives title by descent from his father, is charged with notice of an equity existing in favor of the ancestor, or the co-heirs of the grantor, affecting the land in its descent. *Ib.* 133.
4. *Mortgage by joint owner after partition does not destroy equity in favor of his co-tenants.*—When, after the partition of lands, the title to which was acquired by descent, one of the heirs mortgages the share allotted to him, his mortgagees are charged with notice of equities existing in favor of the other heirs, to have the mortgagor's share applied first, in exoneration of the shares of his co-heirs, to the satisfaction of a prior mortgage executed by their ancestor on the common property for the benefit of such heir and mortgagor. *Ib.* 133.
5. *Action of trespass; right of co-tenant to maintain it.*—A tenant in

TENANTS IN COMMON—*Continued.*

common, owning with others a dwelling-house, one room of which is occupied by her exclusively, has a right to maintain trespass for the disturbance of her possession and occupancy of her room, not involving any injury to the room itself, without joining with her as parties plaintiffs her co-tenants. *Milner et al. v. Milner*, 599.

6. *Trespass; entering room to remove personal effects.*—Where a house, which descended to children as tenants in common from their mother, was afterwards occupied by their father and his second wife with his family, the fact that after the death of their father his second wife remained in the house, and exercised control as the head of the family, did not give her, when about to move thence, the right to enter a room in said house, which up to that time had been occupied by one of the co-tenants, against the protest of the latter, to take therefrom some articles claimed by said wife; and for such wrongful disturbance of her possession of the room, the said co-tenant may maintain trespass. *Ib.* 599.

TENDER.

1. *Action on replevy bond; tender by defendant of assessed value of property.*—When pending an action of detinue, and after the execution by the defendants therein of a replevy bond, a part of the property was destroyed by fire, a tender by the defendants, within 30 days after the rendition of the judgment, of the value of the property so destroyed, as assessed in the detinue suit, meets the obligation of the bond as to the property so destroyed; and it is the duty of the plaintiff to accept the tender. *Heard v. Hicks*, 102.
2. *Bill to enforce the specific performance of a contract of sale; tender of deed before filing bill not necessary.*—It is not essential to the maintenance of a bill for the specific performance of a contract of sale, that the complainant, who is the vendee, should offer to perform or tender a deed before filing the bill; a failure to do so affects only the question of costs. *Ashurst v. Peck*, 499.
3. *Bill to enforce statutory redemption; tender must be averred.*—A bill filed to enforce a statutory right of redemption is without equity, unless it avers a tender as required by statute to the purchaser or his vendee; and when such tender was not practicable before bill filed, the bill, after alleging a sufficient excuse for such failure, must also aver a present tender by payment into court, accompanied by a delivery of the money to the register. *Beatty v. Brown*, 695.
4. *Plea of tender; error without injury.*—Although a plea of tender is defective in not averring that the defendant brought the money into court, the overruling of a demurrer to such defective plea by the trial court does not justify a reversal of the judgment, when another plea of tender to the same count of the complaint was in legal form and in all respects sufficient, and the evidence showed, without dispute, that the money was actually brought into court at the time both pleas were filed. *Christian & Daniel v. Niagara Fire Ins. Co.*, 634.

TITLE.

1. *Homestead set apart to the widow; her estate therein.*—When a homestead, which does not exceed 160 acres and two thousand dollars in value, has been set apart to the widow as exempt under the act approved February 12, 1885, (Sess. Acts 1884-85, p. 14), she takes an absolute inheritable estate in such homestead. *Smith v. Boutwell*, 373.

TITLE—Continued.

2. *Equitable titles; priority.*—As between parties claiming under equal equitable titles, the priority of claim is determined by the priority of time. *Troy, et al. v. May*, 401.
3. *Title acquired by purchaser at execution sale.*—F., after the execution of a mortgage to M., which was still unsatisfied, sold the land conveyed therein to W. After the agreement of sale, but before the conveyance by deed, judgment was recovered in the United States Circuit Court against F. After F. had conveyed the lands to W. by deed, the United States marshal sold the same land under an execution issued upon the judgment recovered against F., and at this sale T. became the purchaser. *Held*, that W. and T. are both equitable claimants, and that the equity of W., being the older, is superior to that of T., conveyed by the marshal's deed. *Ib.* 401.
4. *Title to support ejectment; construction of deed for right of way.*—Plaintiff and his wife executed to the trustee of a railroad company about to be formed a deed of the right of way over plaintiff's land for a railroad "from M., Ala., by A., Ala., to C., Fla., or other points in southeast Ala. or Fla.," provided that the road should be built within three years from a certain date. The company was incorporated, and within three years built a road over a right of way granted in the deed, from M. by A. to L., a station south of M., and in the direction of C. *Held*, that L. was in "southeast Ala.," within the meaning of the deed, and hence plaintiff could not recover in ejectment against the company owning and operating the road. *Knight v. Ala. Mid. R. Co.*, 407.
5. *Creditor has insurable interest in deceased creditors' property.*—The creditor of a deceased debtor, whose estate is insufficient to pay his debts, has an insurable interest in the property of the estate, which may be subjected by a proceeding *in rem* to the payment of his debts; but the recovery can not exceed the amount of the insurable interest. *Creed v. The Sun Fire Office of London*, 522.
6. *Cloud on title; adverse possession.*—When, on a bill filed to remove a cloud from title, adverse possession in the complainant is relied on as a ground for the relief prayed, the bill is not demurrable, on the ground of want of jurisdiction in a court of equity to grant the relief prayed for, since in an action of ejectment brought by the adverse party, the right of the complainant could only be effectuated by extraneous evidence. *Torrent Fire Engine Co. v. City of Mobile*, 559.
7. *Same: bill to quiet title.*—One who has acquired title by adverse possession, can not be guilty of *taches* in instituting a suit to quiet his title and to remove as a cloud the title of another, who disputes the complainant's title acquired by adverse possession. *Ib.* 559.
8. *Defeasible estate; conditional fee.*—Where a testator gives to his grand-son certain property, with the condition that if the grand-son should die leaving no legitimate issue at his death, then the property should go to another named devisee, the grand-son takes a conditional fee, defeasible on his dying without issue; and, on his death without issue, the latter devisee, the contingent remainderman, becomes entitled to the property devised for the recovery of which he may maintain an action of ejectment. *Newsome v. Holesapple*, 682.

TRESPASS.

1. *Necessary averments in complaint to recover penalty under section 3296 of the Code; action of debt.*—In an action brought to recover the penalty imposed by section 3296 of the Code, a complaint

TRESPASS—*Continued.*

- which avers that the plaintiff is the owner of the land upon which the trees were cut, the number and description of the trees, and that they were willfully and knowingly cut by the defendant without the plaintiff's consent, contains all the facts required to be alleged by the statute, and will be treated as an action in debt. *Turner Coal Co. v. Glover*, 289.
2. *Who may maintain action for statutory penalty for cutting trees.*—The right of action to recover the statutory penalty for cutting trees, (Code, § 3296), is given not to the person in possession, but to the owner of the land, whether he was in possession or not at the time the trespass complained of was committed. *Ib.* 289.
 3. *Demurrer to a plea; when properly sustained.*—In an action to recover the statutory penalty for willfully and knowingly cutting trees, the defendant pleaded by special plea that there was conveyed to him by mesne conveyance, from one seized of the lands upon which the trees were situated, "the coal, iron ore, and other minerals on the lands, together with the right to enter on the lands and open drifts, slopes and shafts for the purpose of mining, and also of the timber and water upon the same, necessary for the development, working, and mining of said minerals, and the preparation and removal of the same for market, and the right to build roads over the same, necessary for convenient transportation of the mineral products," and that the defendant entered upon the plaintiff's alleged possession, "as lawfully it might in the manner complained of by said plaintiff, and cut timber, as lawfully it might." *Held*, this plea is open to demurrers which raise the objection that it did not aver that it was necessary to cut the said timber for the development, working and mining of the minerals upon the lands, and it did not aver that said timber was cut and used for the purpose of developing, working and mining the minerals, and preparation of the same for market. *Ib.* 289.
 4. *Pleadings; demurrer to replication.*—In an action to recover the statutory penalty for willfully and knowingly cutting trees, when the defendant by special plea sets up that at the time of the trespass complained of he had the right to cut the said trees, by reason of a purchase by him from the grantee of the one seized of the lands upon which the trees were situated, a replication by the plaintiff to said plea, which avers, that at the time of the pretended sale to the defendant's the one vendor, making such attempted sale did not have the title or right to said trees, or to the surface of the land whereon said trees were located, and that the right and title to the same were in the plaintiff, is not demurrable on the grounds that the said replication brings the plaintiff's title into question, and that it is inconsistent with the complaint in which the plaintiff claims a fee simple title to the land. *Ib.* 289.
 5. *Application for new trial.*—On application for a new trial by defendant, after final judgment at law, on the ground of newly discovered evidence, the petition must show that the defendant was prevented from making the defense shown by the newly discovered evidence, by surprise, accident, mistake or fraud, without fault on his part. *Ib.* 289.
 6. *Execution of mortgage by plaintiff no defense to action to recover statutory penalty for cutting trees.*—Against all persons except the mortgagee, the mortgagor, whether before or after default, is regarded as the owner of the property mortgaged; and therefore, in an action to recover the statutory penalty for willfully and knowingly cutting trees, the fact that the plaintiff had executed a mortgage on the land from which the trees were

TRESPASS—Continued.

- cut to a third person constitutes no defense for the defendant, who claims no right under said mortgage. *Ib.* 289.
7. *Failure to introduce witnesses; when no suspicious circumstance.*—In an action of trespass brought by a purchaser from the defendants in attachment against the sheriff and his sureties, for the wrongful levy of such attachment, when the plaintiff himself has testified as to the purchase of the goods from the attachment debtors, to the circumstances of the transaction, and to the consideration paid, his failure to introduce the debtors as witnesses, they being present in court, is not a suspicious circumstance against the validity of the transaction; and a charge of the court that such failure does not authorize any presumption against the plaintiff is properly given. *Haynes v. McKee*, 318.
 8. *Action to recover statutory penalty for cutting trees; misleading charge.*—In an action to recover the statutory penalty for knowingly and willfully cutting and removing trees from the lands of another without his consent (Code, § 3296), an instruction that defendant is liable for what the trees were worth, though he did not know, at the time the trees were cut, that they were on plaintiff's lands, is properly refused, it being confusing and calculated to mislead the jury, in that the jury might understand therefrom that the defendant was liable in no event for anything more than the value of the wood cut from the land. *Morris v. West*, 534.
 9. *Action of trespass: right of co-tenant to maintain it.*—A tenant in common, owning with others a dwelling-house, one room of which is occupied by her exclusively, has a right to maintain trespass for the disturbance of her possession and occupancy of her room, not involving any injury to the room itself, without joining with her as parties plaintiffs her co-tenants. *Milner et al. v. Milner*, 599.
 10. *Trespass; entering room to remove personal effects.*—Where a house, which descended to children as tenants in common from their mother, was afterwards occupied by their father and his second wife with his family, the fact that after the death of the father his second wife remained in the house, and exercised control as the head of the family, did not give her, when about to remove thence, the right to enter a room in said house, which had up to that time been occupied by one of the co-tenants, against the protest of the latter, to take therefrom some articles claimed by said wife; and for such wrongful disturbance of her possession of the room, the said co-tenant may maintain trespass. *Ib.* 599.
 11. *Same; effect of decree of probate court setting apart such articles as widow's exemption.*—In such an action of trespass for the wrongful disturbance of plaintiff's possession and occupancy of a bedroom, the fact that the articles claimed by the defendant and attempted to be taken from the room, had been set apart to her and a minor son of her late husband by his former marriage by a decree of the probate court as a part of their exempt personalty, did not confer upon such defendant the right to enter the room against the plaintiff's protest. *Ib.* 599.
 12. *Charge to jury; joint and several trespass.*—In an action of trespass against two defendants for a joint and several wrong, a charge to the jury that instructs them that "whatever judgment they rendered, if against the defendant, must be a joint judgment against both defendants," is properly refused, as being misleading and invasive of the province of the jury. *Ib.* 599.

TRIAL AND ITS INCIDENTS.

1. *Comments or notes of clerk of trial court in transcript; when not considered on appeal.*—The clerk of the trial court, in making out a transcript to be used on appeal as the record of the orders of the court and the proceedings of the trial, should transcribe only the orders and judgment of the court as they are entered, and should never incorporate in such transcript any matter or any comments or notes of his own. Such matters, or comments, or notes, if included in the transcript, will not be considered on appeal. *Frieder v. Goodman Manfg. Co.*, 241.
2. *Appeal; when original papers sent up.*—The clerk of the trial court has no authority to take from the files of any suit in his office, an original paper and send it to the appellate court, except upon the order or ruling of the judge or chancellor, when in their opinion it is necessary. *Ib.* 241.
3. *Exception to ruling of trial court; how preserved.*—The record of an exception to the ruling of a trial court can not be secured or preserved by the clerk of such court making immediately after the recital of the ruling an entry in which it is stated that the party against whom the ruling was made reserved an exception, and to which entry is signed the name of the attorney reserving the exception; it is the duty of the court to note the exception by either party litigant to his ruling, and this noting constitutes the evidence of the reservation of such exception. *Ib.* 241.
4. *Rulings on motions; how shown to be reviewed on appeal.*—The rulings of a trial court on motions, which are not entered in the minutes, must be presented on appeal by bill of exceptions; and unless thus presented, such rulings will not be reviewed. *Ib.* 241.
5. *Failure to introduce witness; does not justify an unfavorable inference.*—Where a person, whose evidence would be competent for either party in an action, was in court during the trial and equally accessible to both parties, it is error to charge the jury that they could draw an unfavorable inference against one of the parties for failing to call such person as a witness; and this is true notwithstanding the witness referred to was the husband and grantor of the claimant in a claim suit, where the transfer from him is attacked as fraudulent. *Bates v. Morris*, 282.
6. *Failure to introduce witnesses; when no suspicious circumstance.*—In an action of trespass brought by a purchaser from the defendants in attachment against the sheriff and his sureties, for the wrongful levy of such attachment, when the plaintiff himself has testified as to the purchase of the goods from the attachment debtors, to the circumstances of the transaction, and to the consideration paid, his failure to introduce the debtors as witnesses, they being present in court, is not a suspicious circumstance against the validity of the transaction; and a charge of the court that such failure does not authorize any presumption against the plaintiff is properly given. *Haynes v. McRae*, 318.
7. *Argument of counsel to jury.*—Great latitude must be allowed to counsel in addressing the jury, but his argument should be confined to the evidence before them, and the legitimate inferences to be drawn from that evidence; and when counsel transcends this limit, the court should interfere, on proper objection made, and the failure to do so is a reversible error. *L. & N. R. R. Co. v. Hurt*, 34.
8. *Same; general objection thereto.*—A general objection to statements made by counsel in his argument, some parts of which were authorized by the evidence, is properly overruled; the court not being bound to separate the legal from the illegal. *Ib.* 34.

TRIAL OF RIGHT OF PROPERTY

1. *Evidence as to value of goods in claim suit.*—In a statutory claim suit, where the sale of goods by an insolvent debtor to the claimant, in payment of an alleged indebtedness, is assailed on the ground of undervaluation, the amount the claimant received for such goods at a private sale subsequently made to third parties, is not legal evidence against the attacking creditor of the value of the goods; and questions seeking to elicit such evidence should not be allowed. *Clafin & Co. v. Rodenberg, 213.*
2. *Declarations against the interest of claimant; when incompetent.*—In a statutory claim suit, evidence of declarations made by the grantor of the claimant against the interest of the latter, when he was not present to deny or explain them, is incompetent, and its admission is error. *Ib. 213.*
3. *Charge as to fraudulent conveyance.*—In a statutory claim suit, where the sale of the claimant is attacked as fraudulent, a charge which instructs the jury that they must find a verdict for the claimant, if the evidence in the cause shows an honest intent on the part of the claimant (grantee) to secure the payment of a bona fide indebtedness, and that there was no reservation of benefit to the debtors in the purchase of said goods from them, and that the claimant received no more goods than was sufficient to pay his debts, asserts a correct proposition of law, and is properly given. *Ib. 213.*
4. *Fraudulent conveyance; when more goods delivered than mentioned in bill of sale.*—In a statutory claim suit, where an attacking creditor attacks as fraudulent the sale of the attached property by the debtor to the claimant, if it is shown that there were delivered to the claimant more goods than were mentioned in the bill of sale, the transaction is fraudulent as to the other creditors of the debtor, and the entire sale should be set aside as fraudulent and void. *Ib. 213.*

TROVER.

1. *Action of trover by landlord against tenant for wood cut from rented premises.*—While an action of trespass for injuries to land by the tenant can not be maintained by the landlord, so long as the tenancy continues, and trover can not be maintained by the owner of the land against one in adverse possession for the conversion of timber severed from the freehold, a landlord can maintain an action of trover against his tenant, pending the tenancy, for wood wrongfully cut from the demised premises, and converted by the tenant. Such action involves no inquiry as to the title of the land from which the severance was made, and no inquiry as to the possession of said land. *Brooks v. Rogers, 111.*
2. *Charges invasive of the province of the jury.*—In an action of trover for the conversion of timber wrongfully cut from leased premises, a charge instructing the jury that if they believe from the evidence that the defendant cut down the trees and converted them under the belief that he had the right to do so, under the lease, they "should fix the value of the wood at the place it was cut, after deducting the cost of cutting the same, and after deducting the cost of hauling the same," is properly refused as being invasive of the province of the jury. *Ib. 111.*

TRUSTS AND TRUSTEES.

1. *Bill to enforce trust; when it contains equity.*—A bill in equity which avers that the complainants verbally contracted to purchase a certain lot of land, and not having the means to make the cash

TRUSTS AND TRUSTEES—*Continued.*

payment agreed upon, procured a third person to advance the money as a loan, and to become surety for the deferred payment, that to secure such third person against loss, it was agreed that the deed from the vendor should be executed direct to him, who should re-convey it to complainants upon being repaid the amount loaned and advanced, that the complainants had paid the amount borrowed and the deferred payment, but that the respondent, to whom such deed was made, refused to re-convey the property to them, contains equity; and upon proof of the averments, complainants will be entitled to the relief prayed for, and a decree should be rendered investing the title to the land in them. *Jordan et al. v. Garner, et al., 411.*

2. *Conveyance absolute in terms; evidence necessary to declare it a mortgage.*—When parol evidence is relied upon to have a deed of conveyance of lands, absolute in its terms, declared a mortgage or security for a debt, or to have a resulting trust in lands declared, the evidence adduced must be clear and convincing. *Ib. 411.*

3. *Bill to enforce trust; when evidence insufficient to authorize relief.*—In a bill filed to establish a trust in land, the complainants claimed that they purchased the lands under a parol agreement; that defendant loaned them money to make the cash payment, and became security for deferred payments; that title was taken in defendant's name to secure him, he agreeing to convey the lands to complainants on re-payment by them of his loan, and the balance of the purchase price. The only evidence to establish these facts was the testimony of one of the complainants, and of persons who derived their information from him. The testimony of the defendant, of the vendor, and of the person who took the acknowledgment sustained the claim of defendant, that he made the purchase for himself, that he made the cash payment and paid at maturity his note executed for the deferred payment; and that he verbally promised to sell the land to the complainants, who had been unable to purchase it; and that complainants knew of the sale of part of the land by the defendant, and witnessed valuable improvements thereon, but raised no objection or claim. *Held*, that the complainants were not entitled to the relief prayed, and that the bill was properly dismissed. *Ib. 411.*

4. *Mortgage to secure a pre-existing debt a general assignment.*—Where an insolvent debtor mortgages all of his property to secure a pre-existing debt, and this mortgage is satisfied prior to its maturity by the sale of part of the goods and the procurement of money by the mortgagor from another person by a second mortgage conveying the same property, the first mortgage is declared to be a general assignment for the benefit of the debtor's creditors. (Code, § 1737), and the money received by the first mortgagee, in satisfaction of his mortgage, is a trust fund in his hands, subject to the claims of the mortgagee's creditors. *Aniston Carriage Works v. Ward, 670.*

USURY.

1. *Usury in purchase price of land.*—Where, after there was a parol agreement for the sale and purchase of land at a certain price for cash, the purchaser informed the vendor that he could not pay for the land in cash, and a sale on a credit was subsequently consummated at an advance of 15 per cent. on the cash price, the vendor's deed of conveyance reciting the latter price as its consideration, and the purchaser executing his promissory notes therefor, the transaction was not usurious. *Dykes v. Bottoms, 390.*

VARIANCE.

1. *Ejectment; fatal variance between complaint and averment in description of land.*—When in an action of ejectment the plaintiff sues in his complaint to recover "41 acres of land off of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 2, township 11, range 19;" and the proof shows that on the trial the plaintiff asserted title to "41 acres off of the north and west sides of the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 2, township 11, range 19," there is a fatal variance between the averment and proof, which precludes a recovery by the plaintiff. *Morris & Co. v. Giddens*, 571.
2. *Variance between replication and complaint.*—A replication to a plea can not set up a cause of action different from that declared on in the complaint; and when, in an action on an insurance policy the plaintiff declares on the policy as a valid, binding contract, he can not, by replication to defendant's pleas, avoid its conditions by allegations of fraud, which vitiate the contract. *Christian & Daniel v. Niagara Fire Ins. Co.*, 634.

VENDOR AND PURCHASER.

1. *Purchaser from an heir; charged with notice of equity in favor of other heirs.*—The purchaser of land from one who derives title by descent from his father, is charged with notice of any equity existing in favor of the ancestor, or the co-heirs of the grantor, affecting the land in its descent. *Austin v. Bean*, 133.
2. *Purchasers of public land under act of June 15, 1880.*—Under the provisions of the act of Congress of June 15, 1880 (1 Sup. Rev. Stat., p. 558), only the person who has made entry of homestead and failed to perfect the same, or the transferee of such entryman by writing, executed in good faith, can purchase the land attempted to be entered. *Mulloy v. Cook*, 178.
3. *Contract violative of the public policy of the United States.*—A verbal contract by one who makes a homestead entry of Government land and fails to perfect the same, to purchase such lands under the act of Congress of June 15, 1880, (1 Sup. Rev. Stat. p. 558), and upon receipt of patent convey the lands to the one who furnishes the money with which to make the purchase, is violative of the policy of the General Government, and cannot be made the basis of equitable relief to enforce a trust in such lands in favor of the one whose money was used in paying therefor. *Ib.* 178.
4. *Possession by grantor after execution of deed.*—Where the owner of land has executed and delivered a deed thereto, but has never parted with his actual possession, his possession is not that of owner, but of a tenant of the grantee; and his possession can not become adverse to his grantee without an open and distinct disavowal, and the assertion of a hostile title, brought to the actual knowledge of the said grantee. *Yancery v. S. & W. R. R. Co.*, 234.
5. *Conveyance of right of way; adverse possession of grantor.*—If, after the execution of a conveyance of a right of way to a railroad company, in consideration of the road being built on and along the grantor's land, and upon condition that if the road is not built upon such right of way the deed was to be null and void, the company located, levelled and graded the road along this line, the title passed to the grantee, and it became actually possessed of said right of way; and if, after the lapse of five years from the date of the conveyance, the grantor commenced to cultivate the land formerly conveyed, without the knowledge of the grantee, he did not thereby assert an adverse holding, nor was his cultivation such a re-entry as to originate a right to claim a possession adverse to his grantee. *Ib.* 234.

VENDOR AND PURCHASER—*Continued.*

6. *Condition of deed of conveyance; ejectment can not be maintained after its fulfillment.*—Where the consideration for a conveyance of the right of way to a railroad company was that the road should be built on and along the lands of the grantor, and the deed was conditioned that it should be void if the road was not built on said right of way, the grantor can not declare the conveyance forfeited and maintain ejectment for the land, after the road was built thereon, although not completed until after the lapse of 13 years from the date of the conveyance; neither the charter nor deed fixing any time within which the road was to be built. *Ib.* 234.
7. *Re-delivery of deed does not reinvest title in grantor.*—Upon the execution and delivery of a deed conveying land to the grantee, the title becomes vested in such grantee, and the redelivery of the deed and its mutilation or destruction by the parties can not reinvest the estate in the grantor, or estop the grantee from claiming title under it. *Whisenant v. Gordon*, 250.
8. *Specific performance; what necessary to justify decree.*—To justify a decree for the specific performance of a contract of sale or conveyance of land, the terms of the contract must be definitely alleged, and the evidence to establish it must be such as to produce a clear conviction of the existence and terms of the contract as alleged. *Ib.* 250.
9. *Conveyance of land; must be in writing.*—Conveyances of land must be in writing, and their execution must be accomplished by formalities, the observance of which is calculated to remove all doubt or uncertainty as to the grantor's intention to divest himself of the title to the land conveyed. *Ib.* 250.
10. *Statute of frauds; waiver as a defense to a bill for specific performance.*—The statute of frauds, as a defense to a bill for the specific performance of a contract, is waived unless specially pleaded; and the contract being admitted or satisfactorily proved, it will be enforced although it may be obnoxious to the statute. *Ib.* 250.
11. *Parol agreement for conveyance of land: when specifically enforced.*—A parol agreement for the re-conveyance of land will be specifically enforced, at the suit of the vendee of the original vendor, when the circumstances surrounding the transaction, the conduct of the parties, and the declarations of the grantee in the original conveyance show that it was the intention of the parties to rescind the former sale and re-vest the title in the grantor. *Ib.* 250.
12. *Bill to enforce a vendor's lien; questions of usury and breach of warranty to be decided by the chancellor.*—Where, in a bill in equity to enforce a vendor's lien, the answer of the respondent raises the questions of usury and a breach of the warranty in a deed of conveyance, it is error to order a reference to the register to ascertain whether there was usury in the transaction, and whether there had been a breach of warranty in the deed to the respondent; these questions should be decided by the chancellor. *Dykes v. Bottoms*, 390.
13. *Usury in purchase price of land.*—Where, after there was a parol agreement for the sale and purchase of land at a certain price for cash, the purchaser informed the vendor that he could not pay for the land in cash, and a sale on a credit was subsequently consummated at an advance of 15 per cent. on the cash price, the vendor's deed of conveyance reciting the latter price as its consideration, and the purchaser executing his promissory notes therefor, the transaction was not usurious. *Ib.* 390.
14. *Description of land in conveyance; no abatement of purchase price when void for uncertainty.*—Where a part of the land in a deed

VENDOR AND PURCHASER—*Continued.*

- of conveyance is described as "a portion of the northwest quarter of the northwest quarter and a part of the southwest quarter of the northwest quarter of section 28, all in township 7, range 25," the deed is void as to such land, for uncertainty and indefiniteness in the description; and an abatement of the purchase price will not be allowed the purchaser for a deficiency in the number of acres in said section 28, since both parties must be presumed to have known that the deed conveyed no part of the lands lying in said section. *Ib.* 390.
15. *Abatement of the purchase price of land.*—The defendant in an action to enforce a vendor's lien is entitled to an abatement of the purchase price as to a portion of the lands conveyed in a deed that had not come into his possession, and to which the vendor had no title at the time of his conveyance to the defendant. *Ib.* 390.
 16. *Equitable titles; priority.*—As between parties claiming under equal equitable titles, the priority of claim is determined by the priority of time. *Troy, et al. v. May*, 401.
 17. *Title acquired by purchaser at execution sale.*—F., after the execution of a mortgage to M., which was still unsatisfied, sold the land conveyed therein to W. After the agreement of sale, but before the conveyance by deed, judgment was recovered in the United States Circuit Court against F. After F. had conveyed the lands to W. by deed, the United States marshal sold the same land under an execution issued upon the judgment recovered against F., and at this sale T. became the purchaser. *Held*, that W. and T. are both equitable claimants, and that the equity of W., being the older, is superior to that of T., conveyed by the marshal's deed. *Ib.* 401.
 18. *Right of purchaser at an execution sale.*—When, before the mortgage debt is paid, the mortgagor agrees to sell to a third person the lands conveyed in said mortgage, and after this agreement a judgment is recovered against the said mortgagor, and execution thereunder is levied upon the same lands, and the said lands are sold under this execution, after the execution of the deed in compliance with the agreement of sale, the purchaser at said execution sale acquires the equity of redemption, and as the holder of such equity, is entitled to the excess of the balance due the mortgagor paid by the one who purchases at a subsequent sale under the mortgage. *Ib.* 401.
 19. *Contract of purchase and sale may become binding though unilateral when made.*—A contract of purchase and sale, conditioned upon the seller being able to have certain things done, though void when made because unilateral and imposing no enforceable obligation on the part of the seller, becomes valid and mutually binding upon the seller being able to have done the things, upon the performance of which the contract was conditioned. *Sheffield Furnace Co. v. Hull C. & C. Co.*, 446.
 20. *Same.*—Where an agreement in writing evidences a sale and purchase of a certain quantity of coke at a specified price, provided the seller is able to induce coke manufacturers to build ovens and make a certain portion of the stipulated amount of coke, and provides for notice by the seller at various times mentioned as to how much of the entire quantity of coke can be supplied during certain specified periods, and recites that the conditions of sale, binding the buyer to take the coke as specified and giving the seller the option to furnish it, are entered into to enable the seller to induce the manufacturers to build sufficient ovens by promising a certain sale of their product at a fixed price, the seller obligating himself to use his best endeavor to accomplish this end,—though at the time

VENDOR AND PURCHASER—*Continued.*

made such agreement was unilateral, imposing no enforceable obligation on the seller and, therefore, not binding on the buyer, when the seller induces the manufacturers to build ovens sufficient in number to produce the requisite quantity of coke, the unilateral agreement is converted from a conditional and optional one into a mutually binding contract, imposing mutually enforceable obligations on the parties thereto, for the breach of which suit can be maintained. *Ib.* 446.

21. *Vendor in possession accountable for rents and profits.*—A vendor of land, who has retained title and taken possession, and has bound himself to convey on payment of the purchase money, is accountable to the vendee or his assignee for rents and profits arising from said lands, to the same extent that a mortgagee in possession is accountable to the mortgagor. *Ashurst v. Peck*, 499.
22. *Maintenance; subordinate possession by vendor.*—Where one, who is in possession of lands under a contract of purchase, executes a mortgage thereon, a conveyance of said lands under a foreclosure sale as provided in said mortgage, and a deed from such purchaser to another are not void for maintenance as against the original owner, who, after the death of his vendee under the contract of sale, took possession of the lands and received the rents therefrom; the possession of the lands and the permanency of the rents by the original owner and vendor being presumed to be subordinate to the equitable title of his vendee's mortgagee and those claiming under him. *Ib.* 499.
23. *Vendor's lien; enforcement against assignee of purchaser.*—A vendor who retains title to the land and has the right of possession, but binds himself to convey on payment of the purchase money, can maintain a suit to enforce his lien, which is in the nature of an equitable mortgage, against the purchaser's assignee in a general assignment for the benefit of creditors. *Janney & Cheney v. Habbeler*, 577.
24. *Same; jurisdiction of the court.*—Where a vendor of lands, who retains title, but binds himself to convey upon payment of the purchase money, files a bill to enforce his lien against the assignee of the purchaser in the district court, having equitable jurisdiction in the county wherein the land is situated, a plea to the jurisdiction of said court, which avers the assumption of jurisdiction by a different chancery court of the administration of the trusts created by the purchaser's deed of assignment, and of all the property owned by the assignor, and decreeing that all persons asserting any rights, liens or charges affecting any of the property should prosecute the same in said chancery court, but which does not show that the complainant vendor was a party to said proceedings and had opportunity to be heard, is insufficient as a bar to the exercise of the jurisdiction of the district court in the enforcement of the vendor's rights. *Ib.* 577.
25. *Recitals of deed as evidence of consideration.*—As against an antecedent judgment creditor, claiming as purchaser at a sheriff's sale under execution issued on his judgment, a recital in a deed from the judgment debtor to a third party is no evidence of the payment of a valuable consideration by the grantee therein, and, unaided by other evidence, is insufficient to sustain the conveyance against the purchasing creditor. *Wells v. Watson*, 628.

WAIVER.

1. *Waiver of right to rescind a contract.*—The right to rescind a con-

WAIVER—*Continued.*

- tract for unreasonable delay in the completion of the work agreed to be done is waived and lost by the acceptance of the work done in its incomplete condition, and the devoting of the same to the objects for which it was built. *Florence Gas, El. Light & Power Co. v. Hanby*, 15.
2. *Action on replevy bond; waiver of claim for damages by plaintiff a question for the jury.*—In an action on a replevy bond, when there is testimony tending to show that after the alleged tender of the property replevied by the defendants, the plaintiff exercised control over the property tendered, it is a question for the jury whether or not he refused such property, and shall be held to have waived his claim for damages to it while in defendant's possession. *Heard v. Hicks*, 102.
 3. *Renunciation of contract; waiver thereof.*—Where a party to a contract offers to waive a renunciation of said contract by the other party on certain conditions, but the latter refuses to accept such offer, the party renouncing can not complain if the other party does finally accept and act upon the original renunciation. *Sheffield Furance Co. v. Hall Coal & Coke Co.*, 446.
 4. *Joinder in issue; waiver of insufficiency.*—Where plaintiffs do not interpose demurrers to special pleas, but their replication thereto is, in legal effect, a mere joinder in issue upon such pleas, they will be presumed to have waived any defects therein, and the trial must be had without reference to any insufficiency of said pleas. *Lewis v. Simon & Co.*, 546.

WILLS.

1. *Probate of a will; service of notice on infants.*—In a proceeding for the probate of a will, service of notice upon infants next of kin by handing them a copy is insufficient to bring them into court; the copy should have been left with the father, mother, guardian, or other person having the custody of the minors. *Herring v. Ricketts*, 340.
2. *Appointment of a guardian ad litem for infants.*—Until infants are brought into court by a service of process, according to the rules of practice, the appointment of a guardian *ad litem* for them is unauthorized, irregular, and not sufficient to support a decree against them. *Ib.* 340.
3. *Probate of a will; notice thereof.*—If a will is admitted to probate without legal service of notice upon the persons who are by law entitled thereto, the probate will be vacated and revoked on their application. *Ib.* 340.
4. *Application to vacate probate of will; no presumption in favor of the probate.*—On the application to vacate the probate of a will, there is no presumption in favor of the order of probate, the petition to vacate being a direct and not a collateral attack. *Ib.* 340.
5. *Wills; construction when inartificially drawn.*—In considering a will the effort should be to arrive at the intention of the testator; and in arriving at this intention, when the will is so inartificially drawn as not to be easily understood, the court will consider the whole instrument and the circumstances surrounding the testator at the time of the execution. *Newson v. Holesapple*, 682.
6. *Defeasible estate; conditional fee.*—Where a testator gives to his grand-son certain property, with the condition that if the grand-son should die leaving no legitimate issue at his death, then the property should go to another named devisee, the grand-son takes a conditional fee, defeasible on his dying without issue; and, on his death without issue, the latter devisee, the con-

WILLS—Continued.

tingent remainderman, becomes entitled to the property devised, for the recovery of which he may maintain an action of ejectment. *Ib.* 682.

7. *Evidence; transcript of will.*—Where a will has been duly probated, a transcript of it from the records of the probate court, together with the proof of probate and the order of the court, properly certified, is, under the statute (Code, § 1984), admissible in evidence to the same extent as if the original will was produced; and the fact that such transcript was made out for and used in another case, does not render it less admissible in evidence. *Ib.* 682.

WITNESSES.

1. *Impeachment of party's own witness; right to refresh his memory.*—A party can not impeach his own witness by showing that he is unworthy of belief, or by proving that he has made contradictory statements, but he may refresh his memory in a proper way; and it is not error for the court to permit the plaintiff to ask his witness, for the purpose of refreshing his memory, if he did not testify differently on a former trial. *L. & N. R. R. Co. v. Hurt*, 34.
2. *Contradictory statements by party to suit*—Admissions, which are relevant and material to the issue, made by a party to the suit are always admissible against him; and when the party testifies on a subsequent trial differently from what he did on a former trial, it is competent for the adverse party to give in evidence his statement on the former trial, and it is the duty of the jury to consider both statements in connection with the explanation, if any is made, in the light of all the evidence, to determine which is true. *Ib.* 34.
3. *Impeachment of witness by contradictory statements.*—When it is shown that a witness on his examination makes a statement different from those made on a previous examination, these statements only tend to impeach, and when a witness makes an explanation of the different statements, the jury are not authorized to capriciously reject such explanation. *Ib.* 34.
4. *Same.*—Charges which instruct the jury that a contradiction of a witness by himself constitutes an impeachment, and which ignores an explanation by the witness of such contradiction, tend to mislead the jury and are properly refused. *Ib.* 34.
5. *Failure to introduce witness; does not justify an unfavorable inference.*—Where a person, whose evidence would be competent for either party in an action, was in court during the trial and equally accessible to both parties, it is error to charge the jury that they could draw an unfavorable inference against one of the parties for failing to call such person as a witness; and this is true notwithstanding the witness referred to was the husband and grantor of the claimant in a claim suit, where the transfer from him is attacked as fraudulent. *Bates v. Morris*, 282.
6. *Failure to introduce witnesses: when no suspicious circumstance.*—In an action of trespass brought by a purchaser from the defendants in attachment against the sheriff, when the plaintiff himself has testified to the purchase of the goods from the attachment debtors, to the circumstances of the transaction, and to the consideration paid, his failure to introduce the debtors as witnesses, they being present in court, is not a suspicious circumstance against the validity of the transaction; and a charge of the court that such failure does not authorize any presumption against the plaintiff is properly given. *Haynes v. McRae*, 319.
7. *Personal attendance by a woman as a witness compelled, although*

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WITNESSES—Continued.

her deposition has been taken.—The statute, (Code, § 2813), which provides that when the deposition of a witness, residing in the county in which the cause is pending, has been taken, if affidavit be made that the personal attendance of the witness is believed to be necessary, then such attendance shall be required, is applicable to and includes women whose depositions have been taken, as authorized by section 2801 of the Code. *Ex parte Jenks, 426.*

8. *Conclusion of witness.*—In an action for injuries arising from a train running through an open switch, the engineer of the train which had been the last to pass through the switch previous to the accident, can not testify that the switch was secure when he passed through it, without first stating its condition and how it was secured. *Birmingham R. & E. Co. v. Baylor, 488.*

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